Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

STEVEN CAMBRA, Warden, *Petitioner,*

v.

MICHAEL ANTHONY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the "relation back" doctrine of Rule 15(c) of the Federal Rules of Civil Procedure (FRCP) apply to habeas corpus proceedings? If so, may a petitioner use the relation back doctrine to amend a petition with newly exhausted claims that would otherwise be untimely under the Antiterrorism and Death Penalty Act of 1996 (AEDPA) and which are unrelated to any of the issues in the pending petition?

2. In determining tolling under the AEDPA, must a federal court apply the mailbox rule of *Houston v. Lack*, 487 U.S. 266 (1988) to the filing of a habeas corpus petition in state court, even though the state does not apply such a rule?

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No.

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MICHAEL ANTHONY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Petitioners, the People of the State of California and the Attorney General of the State of California (hereafter, the State), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed on December 15, 2000, appears at Appendix A to the petition and is reported at 236 F.3d 568 (9th Cir. 2000). The Ninth Circuit's January 26, 2001, order denying the State's petition for rehearing and suggestion for rehearing en banc appears at Appendix B.

The unreported district court opinion holding respondent Anthony's petition for writ of habeas corpus in abeyance

appears at Appendix C. Its opinion denying the State's motion to vacate the order holding the petition in abeyance and dismiss the petition as untimely appears at Appendix D. The district court's opinion denying Anthony's request to amend his habeas corpus petition appears at Appendix E and is reported at 21 F.Supp.2d 1094 (N.D.Ca. 1998). The unreported opinion of the district court denying the petition for writ of habeas corpus on the merits appears at Appendix F.

The California Supreme Court's order denying Anthony's petition for writ of habeas corpus on procedural grounds appears at Appendix G.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its opinion on December 15, 2000. It denied the State's petition for rehearing and suggestion for rehearing en banc on January 26, 2001. The Ninth Circuit's mandate issued on February 6, 2001. Jurisdiction of this Court is timely under 28 U.S.C. § 1254(1).

STATUTES AND RULES

Section 2244 of Title 28 of the United States Code provides in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claims is pending shall not be counted toward any period of limitation under this subsection.

Section 2254 of Title 28 of the United States Code provides in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Rule 15 of the Federal Rules of Civil Procedure provides in pertinent part:

> (c) An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or . . . .

Rule 9(a) of the Rules Governing Section 2254 Cases provides in pertinent part:

> (a) A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

STATEMENT OF THE CASE

A state jury convicted respondent (hereafter, Anthony) of first degree murder (Cal. Pen. Code, § 187) and conspiracy to commit murder (Cal. Pen. Code, § 182). The jury found true the financial gain special circumstance. Cal. Pen. Code, § 192(a)(1). Anthony was sentenced to life without possibility of parole. On June 30, 1992, the California Court of Appeal

affirmed the judgment in an unpublished opinion. The California Supreme Court denied review on September 24, 1992.

On April 23, 1997, Anthony filed a petition for writ of habeas corpus containing both exhausted and unexhausted claims in the United States District Court for the Northern District of California. The district court dismissed this "mixed" petition on its own motion. Anthony did not appeal this dismissal. He also filed a habeas corpus petition in the state Supreme Court. Although the state Supreme Court filed the petition on April 25, 1997, the federal district court deemed the petition filed April 21, 1997, applying the federal "mailbox rule."

On June 13, 1997, Anthony filed a new petition in federal district court with one exhausted claim. That petition had a different case number than the dismissed "mixed" petition. However, the district court construed this petition as an "amendment" of the "mixed" petition, although that petition was no longer pending. On July 8, 1997, the district court issued an order to show cause.

On July 30, 1997, the California Supreme Court denied Anthony's habeas corpus petition.

On September 23, 1997, Anthony filed a motion to hold his habeas petition in abeyance, which the district court granted.[1/] The court noted the state Supreme Court had already denied Anthony's state habeas petition. The State moved to vacate the order holding the petition in abeyance and to dismiss

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1. Apparently, Anthony had filed a motion to stay the petition on June 13, 1997, when he filed his exhausted petition, but the district court did not rule on that motion.

the petition as untimely. On February 18, 1998, the district court denied this motion.

On March 23, 1998, Anthony moved to amend the petition with newly exhausted claims. On August 5, 1998, the district court denied the motion as an abuse of the writ and reinstated the order to show cause. On January 20, 1999, the court denied the petition for writ of habeas corpus.

On February 19, 1999, the federal district court granted Anthony's motion for certificate of probable cause to appeal to the United States Court of Appeals. On July 27, 1999, the Ninth Circuit granted Anthony's request to broaden certification with respect to the district court's denial of his motion to file an amended habeas corpus petition.

While the case was pending in the Ninth Circuit, this Court issued its opinion in *Slack v. McDaniel*, 120 S.Ct. 1595 (2000). The State acknowledged that, in light of *Slack*, the district court erred in basing its denial of the motion to amend on the ground of abuse of the writ. However, the State argued that the denial of the motion to amend was proper because the petition itself was not timely, and that even if the petition was timely, the amendments were untimely and the relation back doctrine under Rule 15(c) of the Federal Rules of Civil Procedure (FRCP) did not apply.

On December 15, 2000, the Ninth Circuit filed its decision. The Court reversed the district court's order denying Anthony's motion to amend the petition. Reasoning that the purpose of a statute of limitations is to provide timely "notice," the Ninth Circuit held that a dismissed mixed petition provides "notice" of unexhausted claims that are subsequently exhausted. It also held that the "relation back" doctrine of FRCP Rule 15(c) applies to habeas corpus proceedings. The Ninth Circuit found that the district court properly deemed Anthony's June 13, 1997,

petition as being an amendment of the mixed petition he filed on April 23, 1997, even though that petition was not pending because it had been dismissed. Although the one year statute of limitations had run before Anthony attempted to amend the petition, the Ninth Circuit held that the relation back doctrine applied, and that the district court should have allowed the amendments.

The court also held that the federal mailbox rule applied to the filing of Anthony's petition for writ of habeas corpus in the California Supreme Court. Therefore, it held that the state petition was effectively filed on April 21, 1997, two days before the one year statute of limitation of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) ran. 28 U.S.C. § 2244(d).[2/]

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's opinion addresses issues that are currently exceptionally important in litigating petitions for writ of habeas corpus filed by state prisoners pursuant to 28 U.S.C. § 2254. The Ninth Circuit decision creates a device that eviscerates the AEDPA's one year statute of limitation by allowing the use of FRCP Rule 15(c) without any requirement of timeliness. Under the Ninth Circuit's procedure, all a state prisoner need do is file an improper *mixed* petition within the one year time limit. Such a defective petition must be dismissed, but under circuit authority may be amended to state only exhausted claims and then held in abeyance indefinitely. The state prisoner may then exhaust the other claims in state

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2. The Ninth Circuit upheld the district court's denial of the petition for writ of habeas corpus on the one issue which was addressed on the merits; the State does not seek certiorari of that portion of the opinion.

court at his leisure, and file a second amended petition containing the newly exhausted claims without any specific time constraints.

The Ninth Circuit's analysis and application of Rule 15(c) conflict with the intent of Congress in enacting the AEDPA, and with decisions in other circuits.

There is also a conflict among the circuit courts of appeals on the propriety of a federal court applying the mailbox rule, announced in *Houston v. Lack*, to the filing of pleadings in *state* courts.

In order to ensure that the intent of Congress in enacting the one year statute of limitation in the AEDPA is not thwarted, and to ensure finality of state court judgments, we respectfully ask this Court to grant the petition for writ of certiorari.

ARGUMENT

I.

THE NINTH CIRCUIT'S APPLICATION OF THE RELATION BACK DOCTRINE IN HABEAS CORPUS CASES EFFECTIVELY NULLIFIES THE AEDPA'S ONE YEAR STATUTE OF LIMITATIONS

A. FRCP Rule 15(c) Does Not Apply To Habeas Corpus Actions Brought By State Prisoners

Habeas corpus proceedings are characterized as "civil" in nature. *See Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 265 n. 9, 269 (1978). However, such a "label is gross and inexact." *Harris v. Nelson*, 394 U.S. 286, 293-94 (1969). FRCP Rule 81(a)(2) provides that the FRCP apply to habeas corpus cases "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." Similarly, Rule 11 of the Rules Governing Section 2254 Cases provides that the FRCP "to the extent that they are not inconsistent with these rules, may be applied when appropriate, to petitions filed under these rules." The Advisory Committee Notes to Rule 11 state: "Rule 11 permits application of the civil rules only when it would be appropriate to do so," and emphasize courts should not "rigidly apply [FRCP] rules which would be inconsistent or inequitable in the overall framework of habeas corpus." Hence, not all of the FRCP apply to habeas corpus proceedings.

This Court has held that certain FRCP rules do not apply to habeas corpus proceedings. For example, in *Harris v. Nelson*, 394 U.S. at 298, the Court held that FRCP Rule 33, addressing the use of interrogatories, does not apply to habeas

corpus. The *Harris* Court noted that habeas proceedings are "unique," and "[h]abeas corpus practice in the federal courts has conformed with civil practice *only in the general sense*." *Id.* at 294 (emphasis added). The Court observed that the drafters' intent in the 1938 creation of the FRCP "indicates nothing more than a general and nonspecific understanding that the rules would have *very limited* application to habeas corpus proceedings." *Id.* at 295 (emphasis added). The Court examined the fundamental differences between civil actions and habeas corpus proceedings in reaching its conclusion. See, *id.* at 296; see also, *Browder,* 434 U.S. at 269, n.14 (FRCP Rule 12(b)(6) is inconsistent with habeas practice); *Pitchess v. Davis*, 421 U.S. 482, 488-89 (1975) (FRCP Rule 60(b)(6) is inapplicable to habeas corpus since it would effectively defeat exhaustion requirement).

There is nothing in the AEDPA, Congressional intent or understanding of habeas corpus cases, or Rule 15(c) itself, to support application of "relation back" to habeas corpus proceedings. The relation back doctrine finds its rationale in the purpose served by general statutes of limitation governing civil actions, i.e., to prevent the bringing of stale claims. The unfairness in asserting claims after expiration of the limitation period is minimized if the new claims arise out of claims previously made known to the defendant. In this sense, civil limitations periods serve to prevent delay and ensure a defendant is not unfairly prejudiced in his ability to defend against a claim when evidence may have disappeared and witnesses' memories may have faded. See *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

Before the AEDPA, when Rule 15(c) was drafted, there was no statutory limitation period for filing a federal habeas corpus petition. Hence, the drafters of Rule 15(c) clearly did not contemplate Rule 15(c) applying to habeas corpus cases. By

contrast, in habeas corpus proceedings, the forgoing concerns have long been addressed not by Rule 15(c), but by Rule 9(a) of the Rules Governing Section 2254 Cases, which permits the dismissal of a habeas petition if delay in its filing has prejudiced the state in its ability to respond.

Congress did not enact the AEDPA limitations period to serve a purpose already served by the existing habeas corpus rule. Instead, the AEDPA's limitations period was designed to minimize delay that may occur on collateral review of state court criminal judgments, and to foster finality of state criminal judgments. "'The interest in leaving concluded litigation in a state of repose'" free from "'further judicial revision has played a defining role in shaping the scope of the writ.'" *Teague v. Lane*, 489 U.S. 288, 306 (1989). To achieve this goal, the limitations period ensures that federal habeas petitions by state prisoners are brought and resolved in a timely fashion: that every habeas claim is presented within one year of finality of direct review of the judgment.

Nevertheless, the Ninth Circuit has invoked Rule 15(c) as an end run around the AEDPA limitations period. The Ninth Circuit's majority opinion, applying Rule 15(c) to permit new habeas corpus claims that would be untimely under the AEDPA, renders both the exhaustion requirement and the statute of limitations meaningless. It encourages a petitioner seeking delay to file a mixed petition before the limitations period expires, without any effort to first exhaust all claims in the state court; it removes any incentive to then proceed through the state court with due diligence; and it affords insulation from the statute of limitations by rewarding the state prisoner for first filing a defective mixed petition. The one-year limitations period to file a fully *exhausted* petition is thus effectively nullified, as is this Court's "simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." *Rose*

v. Lundy, 455 U.S. 509, 520 (1982). Congress cannot have intended the easy circumvention of the AEDPA approved by the Ninth Circuit.

Plainly, the relation back doctrine of Rule 15(c) ought not to apply to habeas corpus proceedings, and the Ninth Circuit's decision should be reversed.

B. Even If Rule 15(c) Applies To Habeas Corpus Proceedings, It Can Only Apply If The New Claims Relate To Claims In A Currently Pending Habeas Corpus Petition

Under Rule 15(c)(2), an amendment relates back to the date of the original pleading only when it "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading." The Ninth Circuit's opinion fails to analyze or apply this requirement. Instead, it finds that the mixed petition, which was dismissed and therefore no longer pending in the district court, gave "notice" to the State of the unexhausted claims, thereby triggering automatic relation back under Rule 15(c). This analysis is seriously flawed. First, the State cannot have "notice" from a pleading which has been summarily dismissed by the district court on its own motion, as in the instant case.[3] Second, the only petition pending in this case – the petition filed on June 13, 1997 – contained only one claim, and none of the claims which Anthony sought to add arose out of the conduct, transaction or occurrence set forth in that pleading.

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3. Indeed, to our knowledge, the State was never served with Anthony's "mixed" petition, which was summarily dismissed by the district court. The State can hardly have "notice" of claims in a pleading it does not know about.

Other circuits that have found that Rule 15(c) applies to habeas corpus cases have done so in very limited fashion, recognizing that any broader approach interferes with the AEDPA. Thus, the third, fourth, eighth and eleventh circuits have held that, for purposes of habeas corpus petitions, the "occurrence" in Rule 15(c) is not the state prisoner's trial; this would be "too high a level of generality. . . . Such a broad view of 'relation back' would undermine the limitations period set by Congress in the AEDPA." *United States v. Pittman*, 209 F.3d 314, 318 (4th Cir. 2000); *Davenport v. United States*, 217 F.3d 1341, 1344-46 (11th Cir. 2000). Instead, "in order to relate back, the untimely claim must have arisen from the 'same set of facts' as the timely filed claim, not from separate conduct or a separate occurrence in 'both time and type.'" *Davenport*, 217 F.3d at 1344. Thus, new claims of ineffective assistance of counsel, where the timely petition asserted ineffective assistance of counsel on other grounds, cannot relate back. *Id.* (new claims of ineffective assistance of counsel arose from separate conduct and occurrences in both time and type); *United States v. Espinoza-Saenz*, 235 F.3d 501, 505 (10th Cir. 2000) (same); *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999)(same); *United States v. Duffus*, 174 F.3d 333, 337-38 (3rd Cir. 1999) (same); *United States v. Pittman*, 209 F.3d at 318 (same).

Accordingly, if Rule 15(c) applies to habeas proceedings at all, it does so "*if and only if* . . . the proposed amendment does not seek to add a new claim or to insert a new theory into the case." *United States v. Thomas*, 221 F.3d 430, 431, 435 (3rd Cir. 2000) (to allow a habeas petitioner to amend his petition by adding a new ground for relief after the limitation period has run would frustrate the intent of Congress that federal habeas claims be advanced within one year after a state conviction is final); accord, *Davenport v. United States*, 217 F.3d at 1346.

The Ninth Circuit opinion conflicts with all the basic principles set forth above. The Ninth Circuit reasons that the foregoing cases are distinguishable because the petitioners there attempted to add completely new claims outside the limitations period, whereas here, the state had prior "notice" of the claims because "Anthony's amended petition was included (in unexhausted form) in his original April 23 petition, to which the district court construed his June 13 filing as an amendment." Appendix A, pp. 21-22. This analysis ignores the fact the petition to which the amended petition purportedly related back no longer existed, so there were no pending claims to which the new claims could "relate." Whether the exhausted petition filed on June 13 is considered an amendment of the mixed petition, or a new petition, *it* was the only existing petition pending before the district court and the petition which Anthony sought to amend. That petition contained *only* one claim. To apply rule 15(c) on the theory the State has "notice" of unexhausted claims presented in a mixed petition that was summarily *dismissed* by the district court[4] is a device to sidestep the AEDPA's statute of limitations and the exhaustion requirement.

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4. This Court held that "a district court *must dismiss* habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. at 522 (emphasis added.) A district court may not hold a *mixed petition* in abeyance. *Greenawalt v. Stewart*, 105 F.3d 1268, 1274-75 (9th Cir. 1997). A petitioner may elect to proceed *solely* with his exhausted claim by amending his habeas petition to exclude the unexhausted claims, *or* he may go back to state court to exhaust additional claims and then return to federal court with a *fully exhausted* petition. *Id.* at 510. But in any case, unexhausted claims *must be dismissed. Id.; Calderon v. District Court (Gordon)*, 107 FR.3d 756, 760 (9th Cir. 1997).

Properly viewed, if the relation back doctrine is to be applied to habeas petitions, the untimely new claims must arise out of the same conduct, transaction or occurrence as claims asserted in a *properly* filed habeas petition, not claims in a defective petition which has been properly dismissed. A contrary construction amounts to judicial recission of the AEDPA's statute of limitations period for state prisoners.

We respectfully submit that this Court should grant the petition for writ of certiorari to clarify that Rule 15(c) does not apply to habeas corpus proceedings. If it does apply, this Court should clarify its application to ensure enforcement of 28 U.S.C. § 2244(d).

II.

THE FEDERAL MAILBOX RULE DOES NOT APPLY TO THE FILING OF HABEAS CORPUS PETITIONS IN STATE COURT

This Court should also grant the petition because the Ninth Circuit opinion conflicts with other circuit courts of appeals on the applicability of the federal mailbox rule, announced in *Houston v. Lack*, 487 U.S. 266, to petitions for writ of habeas corpus filed in *state* courts. We also submit that the Ninth Circuit's opinion is inconsistent with this Court's recent decision in *Artuz v. Bennett*, 121 S.Ct. 361 (2000).

The Ninth Circuit applied the federal mailbox rule to the habeas corpus petition Anthony filed in the California Supreme Court, reasoning that "the conditions that led to the adoption of the mailbox rule [in *Houston v. Lack*] are present; the prisoner is powerless and unable to control the time of delivery of documents to the court." Appendix A at pp. 17-18. The Ninth Circuit opinion thus usurped the role of the California Supreme Court in formulating filing procedures for state courts.

In contrast, the Tenth Circuit, in *Adams v. LeMaster*, 223 F.3d 1177 (10th Cir. 2000), held that federal courts do not apply the federal mailbox rule to state habeas petitions:

> [T]he *Houston* decision is not binding on state courts . . . . Each state court must look at its own statutory structure and rules of interpretation . . .
>
> * * *
>
> We do not quarrel with the propriety of the mailbox rule as a solution to the unique problems of a pro se prisoner confronted with a rapidly-

> approaching filing deadline. . . . However, at the risk of stating the obvious, the policy reasons in support of the rule are only relevant when a deadline exists. . . . New Mexico places no time limits on filing a state habeas petition. Therefore, the policy arguments at the core of *Houston* are inapplicable . . . .

Id. at 1183. The Fifth Circuit also concluded that the mailbox rule does not apply to state habeas petitions. *Coleman v. Johnson*, 184 F.3d 398 (5th Cir. 1999).

Like New Mexico, California does not have a statutory time limit for filing habeas corpus petitions. While the state has applied a mailbox rule to pleadings with statutory time deadlines, we are unaware of any cases applying it to the filing of habeas corpus applications. California does recognize *procedural bars* to claims in habeas petitions. However, state procedural bars on claims within a petition do not preclude the *petition* itself from being "properly filed" for purposes of tolling under the AEDPA. *Artuz v. Bennett*, 121 S.Ct. at 364-365.

In *Artuz*, this Court held that an application for habeas corpus relief is "properly filed" under 28 U.S.C. § 2244(d)(2) when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. "An application is 'filed,' as that term is commonly understood, when it is *delivered to, and accepted by the appropriate court officer for placement into the official record.*" *Id.* at 363-64 (emphasis added). This Court was presumably referring to the *state's* laws and rules governing filings.[5/]

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5. Anthony's state petition was delivered to and accepted by the California Supreme Court on April 25, 1997, two days after the one-year AEDPA limitations period had expired. It was "properly filed" under state law and § 2244(d)(2) on that date. Since Anthony had no other fully exhausted state or

We respectfully submit that in order to reconcile the conflict among the circuits, this Court should grant the petition.

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federal habeas petition pending at the time, he missed the one-year AEDPA limitations period, and his entire petition should have been dismissed by the federal court as untimely.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Dated: March 27, 2001

Respectfully submitted,

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Supreme Court, U.S.
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APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL ANTHONY, Petitioner-Appellant, v. STEVEN CAMBRA, JR., Warden, Respondent-Appellee.	No. 99-15458 D.C. No. CV-97-2232-FMS OPINION

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

Argued and Submitted
July 11, 2000, 2000–San Francisco, California

Filed December 15, 2000

Before: William C. Canby, Jr., Stephen Reinhardt,
Ferdinand, F. Fernandez, Circuit Judges.

Opinion by Judge Reinhardt; Partial Concurrence and
Partial Dissent by Judge Fernandez

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed in part an order of the district court and reversed in part. The court held that a district court may treat a habeas corpus petition as an amendment that relates back to the date of an original petition that has been dismissed without prejudice, or an opportunity to resubmit it with only exhausted claims, for failure to exhaust claims alleged in the initial petition in state court.

Facing possible murder charges, appellant Michael Anthony entered into an immunity agreement with California state prosecutors. Anthony denied any participation in the underlying killing, blaming it on cocaine dealer Drax Quartermain.

After years of investigation, the State concluded that Anthony had conspired with Ronald McIntosh to hire Quartermain to kill the victim. The State charged Anthony with conspiracy and first-degree murder with special circumstances. Anthony was unsuccessful in his attempt to have the prosecution dismissed based on the immunity agreement.

A jury convicted Anthony of both charges. He received a sentence of life in prison without the possibility of parole. The California Court of Appeals affirmed, and the California Supreme Court denied review.

On April 21, 1997, Anthony delivered to prison authorities a federal petition seeking relief from the California Supreme Court. The petition was marked filed April 25. Meanwhile, April 23, one year after the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA), Anthony filed a pro

se federal habeas petition alleging six grounds for relief, only one of which had been exhausted in state court. The district court dismissed the petition without prejudice.

On June 13, Anthony filed another petition containing his unexhausted claim and a motion to stay to hold his federal petition in abeyance until he exhausted his five claims in state court. The district court construed the petition as an amendment deleting the unexhausted claims and granted Anthony's motion to stay the petition to allow him to exhaust his five other claims. The court stated that on exhaustion of the five claims, Anthony could move to further amend the petition to add the newly exhausted claims.

Anthony exhausted his five claims in state court and moved to file an amended federal petition that would add the newly exhausted claims.

On August 5, 1998, the District court denied Anthony's motion to amend, citing dicta on the "abuse of the writ"doctrine from a Ninth Circuit case. The court found that Anthony had waited until the last minute to attempt to exhaust his claims before his period of limitations expired on April 23, 1997, and had failed to show why he did not exhaust and raise those claims earlier. The court also concluded that Anthony failed to show that a fundamental miscarriage of justice would result from the court's refusal to entertain his claims.

On January 20, 1999, the district court denied relief on Anthony's one originally exhausted claim–his contention that the State had violated the immunity agreement. Anthony appealed. A panel of the Ninth Circuit granted Anthony's request to expand the certificate of appealability granted by the district court to include the "abuse of the writ" ruling.

Before oral argument, the Supreme Court decided *Slack v. McDaniel*, 120 S. Ct. 1596 (2000), which held that the Court's

precedent had not established that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then exhausted those remedies and returned to federal court, was by such action filing a successive petition.

[1] The district court's application of the "abuse of the writ" doctrine could not survive *Slack*. **[2]** It was plain error for the district court to treat Anthony's amended petition as a second or successive petition. Dismissal of those claims as an "abuse of the writ" was not warranted.

[3] The district court dismissed Anthony's April 23, 1997 petition without affording him an opportunity to amend or to resubmit the petition with only exhausted claims. The question was whether the court acted within its authority when it treated his June 13 petition as an amendment that related back to and preserved his original filing date of April 23. It did.

[4] "Mixed" federal habeas petitions–those containing both exhausted and unexhausted claims– must be dismissed for failure to exhaust state remedies. District courts must provide habeas petitioners with the choice of returning to state court to exhaust their claims, or of amending or resubmitting the habeas petition to present only exhausted claims to the district court. A federal habeas petitioner has a right to amend a mixed petition to delete unexhausted claims as an alternative to suffering a dismissal.

[5] Prior to the AEDPA, dismissal without prejudice to the filing of a new, exhausted petition caused no detriment to the petitioner, because there was no time limitation on the filing of a federal habeas petition. However, AEDPA's one-year statute of limitations has rendered dismissal perilous to some litigants, because petitioners such as Anthony might find themselves time-barred when they attempt to resubmit their exhausted claims to the district court. The district court in this case recognized that its dismissal of Anthony's mixed petition

without prejudice to the filing of a new petition was improper in light of AEDPA. Because the court's dismissal did not afford Anthony an opportunity to strike unexhausted claims, amend, or resubmit the petition so that the amendment or resubmission could relate back to the date of the original filing and not be time barred, construing the June 13 filing as an amendment was, in the court's view, the appropriate remedy.

[6] The district court's outright dismissal of Anthony's April 23 petition was improper. It was error for the court to do so without affording him the opportunity to amend. **[7]** However, the court exercised its equitable powers to accept Anthony's petition *nunc pro tunc* to April 23, the date of the original filing. Anthony's June 13 petition was timely filed.

[8] Even if the district court declined to construe Anthony's June 13 filing as an amendment to his April 23 petition, the June 13 filing of his previously exhausted claim had to be considered timely if AEDPA's statute of limitations was tolled by Anthony's state habeas petition. Applying the "mailbox rule," the court deemed Anthony's petition "properly filed" on that date, thus tolling the limitation period until June 13, 1997, when Anthony filed his new habeas petition. **[9]** Because Anthony's state petition was timely, AEDPA's statute of limitations was tolled during the pendency of state proceedings, and the June 13 petition was therefore timely.

[10] 28 U.S.C. § 2242 states that applications for habeas corpus may be amended or supplemented as provided in the rules of procedure applicable to civil actions. The State cited no authority supporting the proposition that AEDPA renders Rule 15 inapplicable to federal habeas proceedings, and there is substantial authority to the contrary.

[11] Under Rule 15(c)(2), an amendment of a pleading relates back to the date of the original pleading when the claim or defense asserted in the amended pleading arose out of the

conduct, transaction, or occurrence set forth, or attempted to be set forth in the original pleading. The central policy of Rule 15(c) – ensuring that the non-moving party has sufficient notice of the facts and claims giving rise to the proposed amendment – was satisfied in this case. Each of the newly exhausted claims in Anthony's amended petition was included in his original April 23 petition, to which the district court construed his June 13 filing as an amendment. The State had notice of the claims and of Anthony's intention to raise them at the earliest possible time.

[12] Allowing habeas petitioners to invoke Rule 15(c) in these circumstances would not undermine AEDPA's policy of expediting habeas review. Under Rule 15(a), once a responsive pleading has been served, the habeas petitioner must gain leave of court before being permitted to amend. The court may consider whether there is evidence of undue delay, bad faith, or dilatory motive with respect to the filing of the amendment when determining whether leave should be granted. There was no such evidence in this case. Anthony proceeded with reasonable diligence. On remand, the district court was to conduct further proceedings with respect to Anthony's previously unexhausted claims.

[13] Under AEDPA, the court of appeals may reverse a state court's decision denying a petitioner relief only if that decision is contrary to, or involves an unreasonable application of, clearly established federal law as determined by the Supreme Court. **[14]** In determining what constitutes an unreasonable application of federal law, the court of appeals is guided by the doctrine of "clear error," which generally allows for reversal only where the court of appeals is left with a definite and firm conviction that an error has been committed. The court first considers whether the state court erred at all; only after concluding that an error occurred does the court of appeals decide whether that error involved an unreasonable application of controlling law.

[15] Anthony contended that the State's violation of his immunity agreement required the court of appeals to reverse his conviction and sentence.

[16] Anthony's immunity agreement was informal in nature. When a defendant has not been forced to testify and so has not claimed the Fifth Amendment privilege against self-incrimination, the government can grant the defendant varying degrees of immunity in an informal agreement.

[17] The state's interpretation of the immunity agreement did not produce absurd results.

[18] The California Court of Appeal did not err in denying Anthony's due process claim.

Judge Fernandez dissented in part, writing that Anthony's failure to appeal the dismissal of his first habeas corpus petition prevented him from relating his new filing back to dismissed filing.

COUNSEL

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OPINION

REINHARDT, Circuit Judge:

Michael Anthony appeals the district court's denial of his motion to amend his habeas corpus petition filed under 28 U.S.C. § 2254. He also appeals the district court's denial, on the merits, of his unamended petition. We affirm in part, reverse in part, and remand for further proceedings.

I. *Factual and Procedural Background*

Ronald Ewing's body was found washed up on a beach in San Mateo County, California, on May 8, 1984. He had been shot four times.

On May 10, 1984, petitioner Michael Anthony and his attorney met with two San Mateo County sheriff's deputies, a San Mateo deputy district attorney, and an assistant United States attorney. Anthony entered into an immunity agreement recorded in a four-page document and in a taped oral statement setting forth additional provisions. The content of this immunity agreement is reproduced, in pertinent part, in Section II.C.2, *infra*. Anthony denied any participation in Ewing's murder and told the authorities that although he had been with Ewing on the evening of May 7, he had left Ewing in the company of a cocaine dealer (who Anthony believed had killed Ewing) and an unknown woman. The "cocaine dealer" was later identified as Drax Quartermain and the woman as Debra Chandler.

Appendix A

After several years of investigation, the state concluded that Anthony had conspired with his business partner, Ronald McIntosh, and that they had contracted with Quartermain, a hit man, to have Ewing murdered. By information filed in San Mateo County Superior Court, the state charged Anthony with (1) the first degree murder of Ewing, in violation of Cal. Penal Code § 187, the information alleging that the murder was carried out for financial gain under Cal. Penal Code § 190.2(a)(1); and (2) conspiracy to commit murder, in violation of Cal. Penal Code § 182, the information alleging seven overt acts in furtherance of the conspiracy. The information also charged that Anthony had served a prior felony prison term under Cal. Penal Code § 667.5(b). At a preliminary hearing, a magistrate judge rejected Anthony's motion to dismiss the case on the basis of the state's alleged violation of the immunity agreement. The superior court agreed with the magistrate that no violation had occurred.

Anthony was tried in the spring of 1990. The prosecution's chief witnesses were Debra Chandler (Drax Quartermain's companion on the night of the murder), and David Younge. Chandler testified that she had been present when the murder was committed, and that Quartermain had offered her $5000 to be his driver that night. Chandler described hearing the shots fired, and testified that Quartermain acknowledged that he had violated his "contract" by failing to remove the victim's head and hands to make identification impossible. A Corvette – identified as belonging to Anthony – had been present as well at the murder scene.

Younge testified that he had driven Quartermain to various meetings with Anthony and McIntosh during which the murder-for-hire was planned. On one occasion, Anthony and McIntosh brought Ewing to a restaurant so that Quartermain, once again accompanied by Younge, could "eyeball" the intended victim. Younge testified that in the summer of 1984 (after the murder had been committed), Quartermain complained to him

repeatedly that Anthony had not paid him in full for the murder and, at Younge's suggestion, Quartermain thereafter retained an attorney who sued Anthony for breach of contract, seeking compensation for "services rendered."

Other witnesses testified that they had seen Anthony and Ewing together on the night of the murder, including a waitress who recalled waiting on Anthony, Ewing, and Quartermain shortly before the murder was committed. Talbot Gregory, an associate of Quartermain's, testified that approximately a year after Ewing's murder, Quartermain had related that he had shot a black man on the beach, and that the money had been "terrific." Further testimony and documentary evidence confirmed that Anthony and Ewing had a strained business relationship.

On May 3, 1990, the jury found Anthony guilty of both charges. It also found the financial gain special circumstance true, and the trial court found the prior prison term allegation true. On July 1, 1990, the trial court sentenced Anthony to life without the possibility of parole, with a consecutive one-year enhancement for his prior prison term. On June 30, 1992, the California Court of Appeal affirmed the judgment, and on September 24, 1992, the California Supreme Court denied Anthony's petition for review.

On April 21, 1997, Anthony delivered to prison authorities a petition seeking habeas relief from the California Supreme Court. That petition was marked filed by the state court on April 25. Meanwhile, on April 23, 1997 – one year after the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA) – Anthony filed a pro se petition for a writ of habeas corpus in federal court. The petition contained six claims, only one of which had been exhausted in state court. *See Anthony v. Cambra*, 21 F. Supp.2d 1094, 1095 (N.D. Cal. 1998). The district court dismissed the petition without prejudice. On June 13, 1997, Anthony filed another petition

containing only his one exhausted claim, together with a motion to stay the petition pending exhaustion of his unexhausted claims. As the district court later explained, "The court construed the petition as an amendment deleting the unexhausted claims and granted [Anthony's] motion to stay the petition to allow him an opportunity to exhaust his other five claims. Upon exhaustion of those claims, [Anthony] could move to further amend the petition to add the newly exhausted claims." *Id.* On February 18, 1998, the district court denied the state's motion for reconsideration, which argued that Anthony's petition should be dismissed as untimely. *See Anthony v. Cambra*, 1998 WL 164971 (N.D. Cal. Feb.. 18, 1998). Anthony exhausted his five claims in state court and then moved to file an amended petition in federal court that would add his newly-exhausted claims.

On August 5, 1998, the district court denied Anthony's motion to amend. Finding "persuasive" this court's dicta about the "abuse of the writ" doctrine in *Calderon v. United States Dist. Ct. (Taylor)*, 134, F.3d 981, 986-988 (9th Cir. 1998), and relying on *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), the district court found that Anthony had "waited until the last minute to attempt to exhaust his claims before his period of limitations expired on April 23, 1997," and had failed to show cause why he did not exhaust and raise those claims earlier. *Anthony*, 21 F. Supp.2d at 1095-96. Anthony had also failed to show that a fundamental miscarriage of justice would result from the district court's refusal to entertain the claims. *Id.* at 1096. The district court concluded that Anthony's newly-exhausted claims were "barred by principles of abuse of the writ." *Id.*

On January 20, 1999, the district court denied relief on Anthony's one exhausted claim – that is, his contention that the state violated his immunity agreement. On February 16, 1999, Anthony filed a timely notice of appeal. The district court issued a certificate of appealability as to Anthony's immunity-

agreement claim. A panel of this court subsequently granted Anthony's request for an expanded certification of appealability, allowing him to challenge the district court's "abuse of the writ" ruling as well.

II. *Analysis*

A. *Abuse of the writ*

After the district court's ruling that Anthony's amended petition constituted an abuse of the writ, but before oral argument in this case was held, the Supreme Court issued its decision in *Slack v. McDaniel*, 120 S. Ct. 1595 (2000). The state subsequently filed a letter in this court, citing *Slack* and withdrawing its argument "that amendment of an exhausted petition constitutes a second or successive writ."

[1] The state's concession was properly made. It is clear that the district court's application of the "abuse of the writ" doctrine cannot survive *Slack*. Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts incorporates the Supreme Court's decisions regarding successive petitions and the "abuse of the writ" doctrine. *McCleskey v. Zant*, 499 U.S. 467, 487 (1991) (*cited in Slack*, 120 S. Ct. at 1605). Rule 9(b) states:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new or different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

The district court in this case cited *Farmer v. McDaniel*, 98 F.3d 1548, 1560 (9th Cir. 1996), for the proposition that "[t]here is no

requirement" under Rule 9(b) "that the prior petition have been determined on the merits" for the petition alleging new grounds to be dismissed. *Anthony*, 21 F. Supp.2d at 1095. In *Slack*, however, the Supreme Court rejected that proposition and characterized our decision in *Farmer* as "incorrect." 120 S. Ct. at 1606. Quoting and reaffirming its opinion in *Stewart v. Martinez-Villareal*, the Court explained:

> "[None] of our cases . . . have [sic] ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998). We adhere to this analysis. A petition filed after a mixed petition has been dismissed under *Rose v. Lundy* [455 U.S. 509 (1982)] before the district court adjudicated any claims is to be treated as "any other first petition" and is not a second or successive petition.

Slack, 120 S. Ct. at 1605.

[2] Thus, it was error for the district court to treat Anthony's amended petition as a second or successive petition. Dismissal of these claims as an "abuse of the writ" was not warranted.

B. *Timeliness*

As an alternative ground for affirming the district court's denial of Anthony's motion to amend his petition and its denial of his one previously exhausted claim, the state argues that the district court erred in holding that Anthony's federal petition was timely filed. The state contends that Anthony's exhausted claim is time-barred because his petition was filed on June 13, 1997, more than a month after the AEDPA period of limitation expired on April 23, 1997. In this connection, the state argues

that Anthony's state habeas petition, which contained Anthony's five exhausted claims, did not toll the federal limitations period because it was not filed in the California Supreme Court until April 25, 1997, two days after the limitations period had expired.

The district court relied on two alternative theories in denying the state's timeliness objections. First, it reasoned that principles of equity required it to construe Anthony's June 13, 1997 petition "as an amendment or resubmission to the original petition filed on April 23, 1997." *Anthony*, 1998 WL 164971, at *2. That is to say, the district court considered the June 13 filing not as an untimely petition but as an amendment to a timely filed petition. Second, the court applied the prison " mailbox rule" and determined that Anthony's state habeas petition had been filed, for statute of limitations purposes, on April 21, 1997 – two days *before* the expiration of the limitations period. *See id.* at *2-*3. Accordingly, the district court held, AEDPA's statue of limitations was tolled during the period in which Anthony was pursuing state collateral relief, and the June 13 petition was timely. We address each of the district court's rulings in turn.

1. *The June 13 petition*

[3] It is undisputed that the district court dismissed Anthony's April 23, 1997 petition without affording him an opportunity to amend or to resubmit the petition with only exhausted claims. The question is whether the district court acted within its authority when it treated Anthony's June 13 petition as an amendment that related back to and preserved his original filing date of April 23. We hold that it did.

[4] In *Rose v. Lundy*, 455 U.S. 509 (1982), the Supreme Court held that "mixed" federal habeas petitions – that is, those containing both exhausted and unexhausted claims – must be dismissed for failure to exhaust state remedies. The Court

directed district courts to provide habeas petitioners "with the choice of returning to state court to exhaust [their] claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Id.* at 510. In applying *Rose*, this court has "long held that a federal habeas petitioner has a right to amend a mixed petition to delete unexhausted claims as an alternative to suffering a dismissal." *James v. Giles*, 221 F.3d 1074, 1077 (9th Cir. 2000); *see also Taylor*, 134 F.3d at 986.

[5] Prior to the advent of AEDPA, dismissal without prejudice to the filing of a new, exhausted petition caused no detriment to the petitioner, because there was no time limitation on the filing of a federal habeas petition. AEDPA's one-year statute of limitations, however, has rendered outright dismissal perilous to some litigants, because petitioners such as Anthony may find themselves time-barred when they attempt to submit their exhausted claims to the district court. The district court in the instant case recognized that its dismissal of Anthony's mixed petition without prejudice to the filing of a new petition was improper in light of AEDPA:

> The new statute of limitation on the filing of federal habeas corpus petitions requires that district courts provide prisoners who file mixed petitions with an opportunity to strike their unexhausted claims and amend or resubmit their petitions so that their amendment or resubmission can relate back to the date of the original filing and not be time-barred.

Anthony, 1998 WL 164971, at *2. Because the court's dismissal "did not afford petitioner such an opportunity," construing the June 13 filing as an amendment – as opposed to a new (and time-barred) petition – was, in the court's view, the appropriate remedy. *Id.*

[6] As an initial matter, we agree with the district court that its outright dismissal of Anthony's April 23 petition was improper. This court has made clear that district courts must provide habeas litigants with the opportunity to amend their mixed petitions by striking unexhausted claims as an alternative to suffering dismissal. In *Taylor*, we explained that Federal Rule of Civil Procedure 15(a), which allows litigants to amend their pleadings once "as a matter of course" before a responsive pleading has been filed, applies to habeas corpus actions and requires district courts to allow amendment of mixed federal habeas petitions. 134 F.3d at 986; *see also James*, 221 F.3d at 1077-78 (pro se habeas litigants are entitled to a "statement of the grounds for dismissal and an opportunity to amend the complaint to overcome the deficiency unless it clearly appears from the complaint that the deficiency cannot be overcome . . . . [E]ven in the habeas context, we remain guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on pleadings or technicalities.") (citations omitted); *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000) (dismissal of mixed federal petition "is not proper when that step could jeopardize the timeliness of a collateral attack"). Thus it was error for the district court to dismiss Anthony's April 23 petition without providing him the opportunity to amend.

[7] Notwithstanding the district court's error, the state contends that Anthony's June 13 filing cannot be construed as an amendment to his April 23 petition, because that petition had been dismissed, and there was no pending petition that could be amended. However, we agree with the district court that it properly exercised its equitable powers to accept Anthony's June 13 petition *nunc pro tunc* to April 23, the date of the original filing. *See Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998) (en banc) (noting that district court could exercise *nunc pro tunc* power to deem recently filed habeas petitions to have been filed as of the filing date of two earlier petitions that were erroneously dismissed); *cf. Guizar v.*

Estelle, 843 F.2d 371, 371 (9th Cir. 1988) (district court may accept resubmitted petition with only exhausted claims *nunc pro tunc* to date of original filing). Accordingly, Anthony's June 13 petition, which contained only his exhausted claim, was timely filed.[1]

2. *The Mailbox Rule*

[8] Even if the district court had declined to construe Anthony's June 13 filing as an amendment to his April 23 petition, the June 13 filing of his previously exhausted claim must be considered timely if AEDPA's statute of limitations was tolled by Anthony's state habeas petition. Under 28 U.S.C. § 2244(d)(2), "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." The district court found that Anthony had delivered his petition to prison authorities on April 21, 1997 – two days before the AEDPA deadline. Applying the "mailbox rule" of *Houston v. Lack*, 487 U.S. 266 (1988), the court deemed Anthony's petition "properly filed" on that date, thus tolling the limitation period until June 13, 1997, when Anthony filed his new federal habeas petition. *See Anthony*, 1998 WL 164971, at *2-*3.

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1. *Green v. White*, 223 F.3d 1001, 10002 (9th Cir. 2000); *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir. 2000), and *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999) are not to the contrary. In those cases, the petitioners accepted the dismissals of their mixed petitions and, after exhausting state remedies, filed their renewed petitions and attempted to have them relate back to their earlier, properly dismissed petitions. In those circumstances, we denied the relations back because nothing remained of the earlier proceedings. Here, in contrast, Anthony did not accept the dismissal of is mixed petition; he elected instead to resubmit his petition with only his exhausted claim. *Rose* and our own case law plainly provided him that option. The district court erred in dismissing the petition without leave to amend; it acted within its discretion when it corrected its error by construing Anthony's June 13 filing as an amendment.

[9] The state argues that because the California Supreme Court treated Anthony's state habeas petition as filed on April 25, 1996, he missed the AEDPA deadline by two days. Citing the Fifth Circuit's decision in *Coleman v. Johnson*, 184, F.3d 398 (5th Cir. 1999), *cert. denied*, __ U.S.__, 120 S. Ct. 1564 (2000), the state contends that federal courts have no authority to apply the mailbox rule to state filings. However, in *Saffold v. Newland*, 224 F.3d 1087 (9th Cir. 2000), we squarely held that the mailbox rule applies with equal force to the filing of state as well as federal petitions, because "[a]t both times, the conditions that led to the adoption of the mailbox rule are present; the prisoner is powerless and unable to control the time of delivery of documents to the court." *Id.* at 1091. *Saffold* is directly controlling here. Because Anthony's state petition was timely filed, AEDPA's statute of limitations was tolled during pendency of state proceedings, and the June 13 petition was therefore timely.

3. *Anthony's Newly Exhausted Claims*

Having determined that Anthony's June 13 submission of his previously exhausted claim was timely either as an amendment to his April 23 petition or pursuant to the prison mailbox rule, we must now decide whether Anthony's motion to amend his petition to include his newly exhausted claims – which the district court erroneously dismissed as an abuse of the writ – was timely filed. Anthony attached to his June 13 filing a motion to hold his federal petition in abeyance while he exhausted his five remaining claims in state court. Our precedent unequivocally authorizes district courts to stay fully exhausted federal petitions pending exhaustion of other claims. *See Taylor*, 134 F.3d at 986-88; *see also Fetterly v. Paskett*, 997 F.2d 1295, 1301 (9th Cir. 1993).

What makes this case unusual is that Anthony's June 13 motion to stay federal proceedings appears to have slipped through the judicial cracks. The district court was unaware of

the motion until September 23, when Anthony renewed his request, evidently because the original motion had not been file stamped. *See Anthony*, 1998 WL 164971, at *1. Adding further confusion is that neither Anthony nor the state was aware that the California Supreme Court had already denied Anthony's state habeas petition on July 30, prior to the renewal of Anthony's abeyance motion.

On October 29, the district court granted Anthony's motion to stay federal proceedings. It did so even though it noted that Anthony's state petition had already been denied on July 30. The court observed that Anthony had timely filed his original federal petition on April 23, seeking to raise all of his claims, and that he had then agreed to proceed with his exhausted claim only and had promptly requested a stay. Having "proceeded expeditiously and in good faith," Anthony was entitled to the opportunity to present his claims in federal court. *Order Granting Petitioner's Motion to Stay Federal Habeas Petition* at 4, October 29, 1997. Because all of Anthony's claims were now exhausted, the court ordered Anthony to file his amended petition within 30 days of the date of its order. *Id.* at 4-5.

The state moved for reconsideration of the court's October 29 order, and the court reaffirmed its prior ruling by order of February 18, 1998. The court once again directed Anthony to file a motion to amend his petition, together with the amended petition, within 30 days. As explained above, when Anthony did file his motion to amend and his amended petition,[2/] the district court denied the motion under abuse-of-the-writ principles.

It is beyond dispute that had the district court promptly ruled on Anthony's abeyance motion, and had Anthony returned tot

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2. The amended petition was delivered to prison authorities on March 17, 1998 (within 30 days of the court's order) and filed in the district court on March 23, 1998.

he district court with his newly exhausted claims within AEDPA's time limitation, he would have been entitled to proceed with all of his claims in federal court. Here, however, the state's highest court had already denied Anthony's petition at the time the abeyance motion was granted. Therefore, as of July 30, 1997, AEDPA's statute of limitations was no longer being tolled by state-court proceedings, and Anthony's amended petition – filed in March of 1998 – was untimely, unless it "related back" to the original petition. Anthony contends that under Federal Rule of Civil Procedure 15(c), his amended petition related back to his timely filed petition, thereby avoiding AEDPA's strict period of limitation. The state insists that Rule 15(c) cannot apply to habeas corpus cases in light of AEDPA, because allowing relation back of otherwise time-barred claims would offend Congress's intent to expedite the presentation of claims in federal court.

[10] We reject the state's argument. 28 U.S.C. § 2242 states that applications for habeas corpus "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." Similarly, Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts states that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to the petitions filed under these rules." The state has cited to no authority that supports the proposition that AEDPA renders Rule 15 inapplicable to federal habeas corpus proceedings, and there is substantial authority to the contrary. *See, e.g., Calderon v. Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring) (under Habeas Rule 11, and unless otherwise expressly governed by statute, habeas corpus amendments are governed by Rule 15); *United States v. Thomas*, 221 F.3d 430, 436 (3d Cir. 2000) (holding that Rule 15(c) applies to post-AEDPA § 2255 petitions); *Mederos v. United States*, 218 F.3d 1252, 1254 (11th Cir. 2000) (applying Rule 15(c) to post-AEDPA habeas petition and holding that amended pleading related back to original timely pleading);

Grossi v. United States, 1999 WL 439237, at *10-*11 (N.D.Ill. June 28, 1999) (applying Rule 15(c) to post-AEDPA petition to allow amendment of timely § 2255 petition to include otherwise untimely claims). Indeed, we see no inconsistency between AEDPA's statute of limitations and Rule 15(c)'s amendment regime where, as here, the state is on notice of the claims to be raised; as a leading treatise explains, "[t]he rationale of allowing an amendment to relate back is that once a party is notified of litigation involving a specific factual occurrence, the party has received all the notice and protection that the statute of limitation requires."[3]

[11] Under Rule 15(c)(2), an amendment of a pleading relates back to the date of the original pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." We need not determine here the full scope of the rule's application to amendments of habeas petitions, because in this case, it is plain that the central policy of Rule 15(c) – ensuring that the non-moving party has sufficient notice of the facts and claims giving rise to the proposed amendment – has been satisfied. Each of the newly-exhausted claims in Anthony's amended petition was included (in exhausted form) in his original April 23 petition, to which the district court construed his June 13 filing as an amendment. Consistent with the rule, those claims had been "set forth or attempted to be set forth in the original pleading." The state clearly had prior notice of the claims and of Anthony's intention to raise them at the earliest possible time.[4] Thus, this case is

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3. James Wm. Moore et al., *Moore's Federal Practice* § 15.19[1] (3d ed. 1999).

4. We need not consider here a different theory on which Anthony's amended petition may also relate back. The June 13 petition was timely and was accompanied by a motion to stay, which likely set forth or incorporated by reference the unexhausted claims. Therefore, the amended petition might be deemed to relate back to the June 13 petition, even in the absence of the *nunc pro tunc* treatment afforded the June petition by the district court. We

easily distinguishable from the cases cited by the state in which other circuits have declined to apply Rule 15(c) to attempted amendments; in those cases, the courts specifically relied on the *absence* of notice to the state regarding the content of the proposed amendments as grounds for denying the motions. For example, in *United States v. Craycraft*, 167 F.3d 451 (8th Cir. 1999), the petitioner timely filed a petition under section 2255, then, following expiration of AEDPA's statute of limitations, sought to amend his petition by adding an entirely new claim for relief. The court explained that the touchstone of Rule 15(c) is notice; in this case, the court "[could] not say that [the petitioner's] original petition would provide notice of such a different sort of theory," so Rule 15(c) could not be invoked. *Id.* at 457. Similarly, in *United States v. Duffus*, 174 F.3d 333 (3d Cir. 1999), the petitioner's proposed amendment, filed after AEDPA's deadline, raised a "completely new" allegation of ineffectiveness of counsel and therefore could not relate back to the earlier petition. *Id.* at 337 (citing *Craycraft*).[5] In stark contrast, Anthony presented all of his claims to the district court within AEDPA's limitation period and legitimately requested that his exhausted claim be held in abeyance; he has not employed Rule 15(c) merely as a method of extending AEDPA's deadline.

[12] We note that, contrary to the state's admonitions, allowing habeas petitioner's to invoke 15(c) in these circumstances will not undermine AEDPA's policy of expediting habeas review. Under Rule 15(a), once a responsive pleading has been served, the habeas petitioner must gain leave of the court before being permitted to amend. Although, under

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see no reason to complicate this procedural labyrinth further, however, and thus do not consider the alternate theory.

5. *See also Davenport v. United States*, 217 F.3d 1341, 1344 (11th Cir. 2000) (untimely amendment including only entirely new claims could not relate back to original timely petition); *United States v. Pittman*, 209 F.3d 314, 317-18 (4th Cir. 2000) (same).

the rule, "leave shall be freely given when justice so requires," the district court may consider whether there is any evidence of "undue delay, bad faith or dilatory motive" with respect to the filing of the amendment when determining whether leave should be granted. *Foman v. Davis*, 371 U.S. 178, 182 (1962). So, had Anthony, without explanation, waited several years, or even several months, before filing his proposed amendment, it might well have been within the district court's discretion to deny leave to amend under Rule 15(a). Here, however, there is no evidence of undue delay; on the contrary, any delay regarding the amendment was largely caused by the district court's request for briefing on Anthony's motion to stay proceedings and by the state's motion to reconsider the court's ruling. The only period of "delay" even arguably attributable to Anthony is the time between July 30 – when, unbeknownst to Anthony or the state, the California Supreme Court denied his state petition – and September 23, when Anthony renewed his motion to stay federal proceedings. During that time, Anthony had not been notified that his state petition was no longer pending before the state courts, and he could not have known why the district court had neglected to rule on his June 13 motion to stay proceedings. We agree with the district court's conclusion that Anthony proceeded with reasonable diligence. We add only that after September 23, 1997, Anthony's filings complied with the schedule imposed by the district court, so he cannot properly be held responsible for the timing of the proposed amendment. Rule 15(c) is ideally suited to circumstances such as these, and we hold that Anthony's amended petition, which included the five previously unexhausted claims contained in his original timely petition, related back to that petition. Accordingly, we reverse and remand to the district court for further proceedings with respect to those claims.

We now turn to the merits of Anthony's unamended petition, which raised a single claim for relief.

C. *The Immunity Agreement*

1. *Standard of Review*

[13] Under AEDPA, this court may reverse a state court's decision denying a petitioner relief only if that decision is "contrary to, or involve[s] an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court's decision is "contrary to" federal law if it either (1) fails to apply the correct controlling authority, or (2) applies the controlling authority to a case involving facts "materially indistinguishable" from those in a controlling case, but nonetheless reaches a different result. *Williams v. Taylor*, 120 S. Ct. 1495, 1519-20 (2000). A state court's decision can involve an "unreasonable application" of federal law if it either (1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or (2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. *Id.* at 1520.[6]

[14] In determining what constitutes an "unreasonable application" of federal law, this court is guided by the doctrine of "clear error," which "generally allows for reversal only where the court of appeals is left with a 'definite and firm conviction' that an error has been committed." *Van Tran*, 212 F.3d at 1153. In making this determination, this court first considers whether the state court erred at all; only after concluding that an error occurred does this court decide whether that error involved an

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6. In holding that the "California Court of Appeal's carefully-reasoned decision is *not so clearly incorrect that it would not be debatable among reasonable jurists*," (emphasis added), the district court applied the Fifth Circuit's formulation of the standard of review under § 2254(d)(1), *see Drinkard v. Johnson*, 97 F.3d 751, 768-69 (5th Cir. 1996). The Supreme Court rejected this formulation in *Williams*, 120 S. Ct. at 1521-22.

unreasonable application of controlling law within the meaning of section 2254(d). *Id.* at 1155.

2. *The Agreement*

[15] Anthony contends that the state's violation of his immunity agreement requires this court to reverse his conviction and sentence. Anthony's written immunity agreement states, in pertinent part:

> It is agreed that at the present time, MICHAEL ANTHONY is not a suspect of this crime and that he was contacted by the police officers as part of their investigation of the killing of Ron Ewing. That shortly after they attempted to contact Mr. ANTHONY, arrangements were made for him to voluntarily come to the police station for the purposes of providing the information that he knew. That based upon the above-recited facts, JUDD C. IVERSEN, attorney for MICHAEL ANTHONY, advised him that he should not speak to the police officers prior to obtaining an agreement for immunity and the cooperation and assistance of the law enforcement authorities in attempting to prevent any revocation of the probations which MICHAEL ANTHONY is presently serving.
>
> Based on the desire of MICHAEL ANTHONY to cooperate with the investigating homicide detectives and their need to obtain the information from him to locate and to bring to justice the perpetrator of the crime, it is agreed that there will be no state or federal prosecution of MICHAEL ANTHONY with regard to the killing of Ron Ewing provided MICHAEL ANTHONY is telling the truth when he represents that he is not the person who actually did the shooting of Ron Ewing and that he did not enter into an agreement prior to the killing with the perpetrator of the killing that that person was to kill

> Ron Ewing. Although it is not apparent that MICHAEL ANTHONY faces any criminal liability based upon the actual killing of Ron Ewing, it is agreed that provided he has been and continues to be truthful with regard to his knowledge of that killing, he will be given immunity from any state and/or federal prosecution based upon that homicide.

In addition to the written instrument, the parties recorded a statement "memorializing" the agreement between Anthony and the district attorney's office. On that recording, a prosecutor first summarized the terms of the written agreement:

> The agreement [purports] to be a grant of immunity with respect to the information which the witness is about to provide to law enforcement[.] [W]ithout going into specifics, it in effect grants this witness use and transactional immunity with respect to narcotic transactions which have occurred and about which he's about to provide information. It, it had, it's a grant of limited immunity with respect to the homicide. The understanding generally being by the parties that if the witness cooperates and provides truthful information and was not a principal in the homicide, he then will not suffer any prosecution. It's anticipated that he will provide at all times truthful information, that he'll cooperate with us and, and in exchange for that, there will be no prosecution, assuming, in fact, there could be one based upon his involvement and or presence with the victim in this case.

Anthony then asked the prosecutor to clarify that accusations from the two people whom he had implicated in the murder (later identified as Drax Quartermain and Debra Chandler) would not be sufficient to establish that he had violated the immunity agreement:

Anthony: Uh, at that meeting also that you said that I want it on tape. That you, that you have said and I feel that when we bring this guy to trial that possibly he's gonna try to point his finger at me and, as a last result. Is that how you say that?

Prosecutor: Okay. It's anticipated that, that based upon the recitals and what limited conversations we've had with the witness and his attorney, Mr. Iverson, that the potential suspect, referred to as the perpetrator in the agreement, may well indicate that the witness, in fact, was the person who actively participated in the crime. It's also my understanding from our limited conversations that present at the scene at the time of the departure of the witness was a third person. Possibly a female subject. It's the understanding of the office of the District Attorney that the accusations, if any, to be made by those two people, toward yourself,

would not constitute a basis for violating this agreement.

Finally, Anthony asked for assurance on the subject of his probation:

Anthony: Everybody's gonna do everything in their power not to get me violated for helping. Is that correct?

Iverson: That's true.

Prosecutor: As long as, as along as you cooperate fully with, with the police officers.

Anthony: Okay.

Prosecutor: And provide truthful information.

Anthony: Okay.

Prosecutor: And that you understand that at some future date and time we develop independent evidence that you, in fact, were an active participant in the crime, a principal, why then all the information which you're providing us today can be used to prosecute you? Do you know?

Anthony: I understand that.

Prosecutor: And that would relate to not only your probation violations, but also to narcotic offenses as well as the homicide?

Anthony: I understand.

Iverson: But that's correct and with, and we've also discussed the fact that evidence is more than simply this gentleman and his girlfriend or whoever she was, coming forward and trying to, to involve you –

Prosecutor: Right.

Iverson: We require some sort of corroborating evidence.

Anthony: Okay. I understand that. I understand that sir.

D. *Analysis*

Anthony contends that his right to due process was violated because the state failed to honor his immunity agreement. He does not argue that the state failed to obtain the "corroborating evidence" (e.g., the testimony of Younge) specified in the informal agreement, but rather that under the agreement, the use of that evidence against him was prohibited because it was derivative. Anthony is incorrect.

[16] As the district court recognized, Anthony's immunity agreement was informal in nature. "When, as in this case, the defendant has not been forced to testify and so had not claimed the Fifth Amendment privilege against self-incrimination, the government can grant the defendant varying degrees of immunity in an informal agreement." *United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995) (citations omitted).

Anthony contends that the immunity agreement granted him derivative use immunity, which would have required the state "to have derived all the information on which the subsequent prosecution was based from a source wholly independent of the statements made in the interview." *United States v. Plummer*, 941 F.2d 799, 803 (9th Cir. 1991). In other words, according to Anthony, the agreement prohibited the state from prosecuting him on the basis of any evidence derived from the information Anthony provided on May 10, 1984, about the person he identified as "Drex" and "the female subject." In making this argument, Anthony points to the prosecutor's statement that the state could use "all the information which you're providing today" only if "at same future date and time we develop independent evidence that you, in fact, were an active participant in the crime, a principal."

The question, of course, is: evidence "independent" of what? Anthony insists that the "independent evidence" remark was ambiguous and, therefore, should be construed in his favor. *See Plummer*, 941 F.2d at 804. On this point, however, we agree with the analysis of the California Court of Appeal:

> On appeal, Anthony once again contends the immunity agreement was breached and that his prosecution should have been dismissed. He renews his interpretation of "independent evidence," and argues that any evidence obtained through his statement could not be used against him to prove his guilt at trial. Anthony's interpretation of the phrase "independent evidence" is strained. When

> the phrase is read in context, it is clear the immunity agreement contemplated by the prosecution could pursue any information provided by Anthony. The agreement contemplated only that Anthony's immunity would not be abrogated simply on the uncorroborated accusations of the two persons present at the scene of the murder. If the prosecution developed evidence of Anthony's involvement in the murder "independent" of the uncorroborated accusations of these two persons, then Anthony could be prosecuted based on all the evidence the prosecution could muster – including the information provided in the statement. In other words, the "independent evidence" referred to in the agreement is evidence independent of the accusations of the perpetrator and his companion, not evidence independent from witnesses and lead develops from Anthony's statement.

Put slightly differently, Anthony's agreement involved two conditions: (1) he would not be prosecuted "provided" he was "telling the truth" that he neither killed Ewing nor arranged for his murder; and (2) the uncorroborated accusations of Quartermain and Chandler would constitute an insufficient basis for the state to conclude that Anthony was not "telling the truth." The latter condition was introduced into the statement at the insistence of Anthony himself, who was evidently concerned about the prospect that Quartermain, once arrested, would point the finger at him. Where this left Anthony was that if Quartermain and Chandler sought to implicate him, he could only be prosecuted if the state obtained corroboration of their accusations.

[17] In retrospect, of course, the agreement turned out to be rather a bad deal for Anthony. An agreement providing immunity on the condition that the subject is telling the truth about his lack of involvement in the crime does not accomplish much. This court has observed that immunity agreements are

"to be read as a whole and given a reasonable interpretation, not an interpretation that would produce absurd results." *United States v. Irvine*, 756 F.2d 708, 710 (9th Cir. 1985) (citations omitted). Accordingly, we would hesitate to affirm a construction of the agreement under which Anthony could have received absolutely no benefit. The agreement did, however, provide Anthony with immunity from prosecution based merely on the testimony of Quartermain and Chandler, and it also provided him a promise of assistance from state and federal authorities to prevent the revocation of his probation, as well as immunity from state and federal drug prosecution for the drug offenses he admitted committing on the evening of May 7, 1984. We therefore conclude that the state court's interpretation of the immunity agreement did not produce an absurd result.

[18] Because we hold that the California Court of Appeal did not err in denying Anthony's due process claim, its decision necessarily is not contrary to, nor does it involve an unreasonable application of, controlling law under § 2254(d)(1).

III. *Conclusion*

We affirm the district court's denial of Anthony's due process claim based on the alleged violation of his immunity agreement. We reverse the denial of Anthony's motion to amend his section 2254 petition to include his five previously unexhausted claims, and we remand for further proceedings on those claims.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FERNANDEZ, Circuit Judge, concurring and dissenting:

Appendix A

I concur in parts II-A, II-B-2, and II-C of the majority opinion. However, I am unable to concur in parts II-B-1 or in II-B-3.

In particular, the simple fact is that, for good or ill, the first federal habeas corpus petition was dismissed. Even if it should not have been, Anthony should have appealed. His new filing could not relate back to the dismissed filing. *See Green v. White*, 223 F.3d 1001, 1003 (9th Cir. 2000); *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir. 2000); *Henry v. Lungren* 164 F.3d 1240, 1241 (9th Cir. 1999). The majority's carving out of a district-court-should-not-have-dismissed-in-the-first-place rule will breed nothing but confusion. Again, if Anthony was not satisfied with the ruling, he should have appealed it; he did not. The majority's distinguishing of our prior cases is not persuasive. *See* Maj. Op. p. 16080 n.1. The point of those cases did not turn on whether the petitioner had exhausted the unexhausted claims; it was that there was nothing to relate back to once there was a dismissal. Of course, I recognize that any case can be distinguished, but attempted distinctions of the kind made in the footnote seem to undercut any suggestion that we will follow precedent.

As a result, because the holding in part II-B-3 of the proposed opinion hinges on the notion that the June 13th petition was merely an amendment to the April 23rd petition, which included all claims, I do not agree with that portion of the opinion neither. I do not disagree with the general principle that relation back theories are available in proper habeas corpus cases. However, again, I disagree with the minor premise. In fact, the result here points to one of the dangers lurking in the minor premise in the first place. The mere mention of unexhausted claims becomes sufficient to stop the statute of limitations on all claims, even if the petition, itself, has been dismissed. In other words, whatever might be said for the relation back doctrine, it cannot help Anthony in this case. That

being so, I would not reach the issue at all, and I do not join in that portion of the majority opinion.

Finally, although I do concur in part II-C, I am constrained to say that I cannot join in the notion that "providing immunity on the condition that the subject is telling the truth about his lack of involvement in the crime does not accomplish much." *See* Maj. Op. p. 16094. I do not quite see why, in general, the only useful form of immunity is one that permits lying. I find that to be a rather strange concept. Here Anthony's alleged concern was that the others would lie about him, and he did not want to fight that particular battle. As it was, he was the one who was lying. It did not accomplish much for *him*, but to state that in principle you do not get much from telling the truth seems unduly cynical, and also seems to put some kind of premium on picaresque activity. Certainly, no defendant should rely on that particular dictum as a way of claiming that counsel failed him when he was allowed to agree to a truthfulness term.

Thus, for the reasons set forth above, I concur in part but respectfully dissent in part.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ANTHONY, Petitioner-Appellant, **v.** **STEVEN CAMBRA, JR., Warden,** Respondent-Appellee.	No. 99-15458 D.C. No. C97-2232-FMS **ORDER**

Before: CANBY, REINHARDT, FERNANDEZ, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Fernandez vote to deny the petition for rehearing en banc and Judge Canby so recommends.

The full court has been advised of the petition for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P.35.

The petition for rehearing and the petition for rehearing en banc are denied.

Appendix C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ANTHONY, Petitioner, **vs.** **STEVEN CAMBRA, Warden,** Respondent.	No. C 97-2232 FMS (PR) **ORDER GRANTING PETITIONER'S MOTION TO STAY FEDERAL HABEAS PETITION**

Petitioner filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this court on April 23, 1997. Because the petition contained both unexhausted and exhausted claims, it was dismissed without prejudice. See Anthony v. Cambra, No. C 97-1474 FMS (PR), slip op. at 1-2 (N.D. Cal. May 22, 1997) (order of dismissal). Petitioner promptly refiled his petition alleging an exhausted claim only: the government violated its immunity agreement and denied petitioner his right against self-incrimination and to due process by using information he provided to them against him. The court found that petitioner's claim, liberally construed, was cognizable under § 2254 and ordered respondent to show cause why a writ of habeas corpus should not be issued. See July 8, 1997 Order at 2-3.

Petitioner now moves the court to exercise its discretion and stay the instant petition while he exhausts five claims that are pending in the Supreme Court of California and that he presented to that court before he filed his federal petition. Petitioner would amend his federal petition to include his other claims once they are exhausted and thereby avoid piecemeal

litigation in federal court. Respondent contends that staying the instant petition while petitioner exhausts state judicial remedies as to additional claims would constitute staying a "mixed" petition.

This court must dismiss a petition containing both unexhausted and exhausted claims. See Rose v. Lundy, 455 U.S. 509, 522 (1982); Greenawalt v. Stewart, 105 F.3d 1268, 1273-74 (9th Cir.), cert. denied, 117 S. Ct. 794 (1997). It "has discretion to stay a petition [that] it may validly consider on the merits," however. See id. at 1274. It may, for example, stay, rather than dismiss, a valid petition containing only exhausted claims to give the petitioner time to exhaust newly-discovered claims in state court. See Fetterly v. Paskett, 997 F.2d 1295, 1301-02 (9th Cir. 1993), cert. denied, 513 U.S. 914 (1994).

The instant petition only contains an exhausted claim and therefore may be stayed; however, a stay should be granted in exceptional cases only. The claims petitioner seeks to pursue must be cognizable under § 2254; there must be a likelihood of prejudice to petitioner if the stay is not granted; and there must be no evidence that the motion for a stay is brought to delay, to vex, or to harass, or that the request is an abuse of the writ. See id.; see also Greenawalt, 105 F.3d at 1274 (equities favoring stay greatly diminished when petitioner presents issue in context of successive petition). Petitioner presents such an exceptional case.

First, the claims petitioner seeks to pursue–prosecutorial misconduct, incomplete jury instructions, insufficiency of the evidence, improper charging of special circumstance, and denial of due process due to cumulative error–are cognizable under § 2254. Second, the claims likely will be barred by the pertinent one-year statute of limitation if the stay is not granted.[1/]

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1. The claims also likely will be barred by § 2244 (b) for abuse of the writ if they are raised in a successive petition.

Petitioner contends that because he is in custody he likely will not learn of the Supreme Court of California's decision on his state petition in time to file a federal petition within the one-year statute of limitation. He correctly notes that he will have only five days from the date of the state court's decision to file a federal petition.[2/] Remarkably, neither petitioner nor respondent appear to be aware that the Supreme Court of California denied the petition on July 30, 1997 and that petitioner's claims indeed likely will be time-barred if the stay at issue here is not granted. Third, and most importantly, there is no evidence whatsoever that petitioner's motion for a stay is brought to delay, to vex, or to harass, or that the request is an abuse of the writ. Petitioner filed a federal petition before a new statute of limitation expired on April 23, 1997 and understandably sought to raise all of his cognizable claims (exhausted and unexhausted); when he could not, he agreed to proceed with an exhausted claim only and promptly moved for a stay pursuant to Fetterly in order to preserve his right to federal review of all of his cognizable claims. Petitioner has proceeded expeditiously and in good faith–all the claims he wishes to pursue in federal court in fact now appear to be exhausted.

Under these circumstances, the court will exercise its discretion under Fetterly and Greenawalt and STAY the instant federal petition and proceedings.[3/] In view of the Supreme Court of California's recent decision on petitioner's state

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2. Petitioner filed his state petition on April 18, 1997, five days before the one-year statute of limitation expired. The statute is tolled while a state petition is pending, see 28 U.S.C. § 2244 (d) (2); however, this means that petitioner will have five days after his state petition is decided to file a federal petition.

3. Again, it must be stressed that a stay is appropriate in exceptional cases only. State prisoners with a valid federal petition should not seek and be granted stays of their federal habeas proceedings simply to search out new claims. See Sterling v. Scott, 57 F.3d 451, (5th Cir. 1995) (federal courts may not be used as "a jurisdictional parking lot"), cert. denied, 116 S. Ct. 715 (1996).

petition, however, petitioner shall file an amended petition containing all exhausted and cognizable claims he wishes to raise in federal court by no later than thirty days from the date of this order.

SO ORDERED.

DATED:

FERN M. SMITH
United States District Judge

Appendix D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ANTHONY, Petitioner, **vs.** **STEVEN CAMBRA, Warden,** Respondent.	No. C 97-2232 FMS (PR) **ORDER DENYING MOTION TO VACATE ORDER AND TO DISMISS PETITION AS UNTIMELY**

I.

Petitioner, a state prisoner proceeding pro se, first filed a federal petition for a writ of habeas corpus on April 23, 1997. Because the petition contained both unexhausted and exhausted claims, it was dismissed without prejudice. See Anthony v. Cambra, No. C 97-1474 FMS (PR), slip op. at 1-2 (N.D. Cal. May 22, 1997) (order of dismissal). Petitioner filed a new petition on June 13, 1997 alleging only an exhausted claim: the government violated its immunity agreement and denied petitioner his right against self-incrimination and to due process by using information he provided to them against him. The court found that petitioner's claim, liberally construed, was cognizable under 28 U.S.C. § 2254 and ordered respondent to show cause why a writ of habeas corpus should not be issued. See July 8, 1997 Order at 2-3.

On September 23, 1997, petitioner informed the court that in June 1997 he submitted with his petition a motion to hold the petition in abeyance, but that the motion was not file stamped. He requested that the court rule on his motion and stay the petition containing one exhausted claim while he exhausted five

additional claims that were pending in the Supreme Court of California since April 18, 1997. Petitioner later would seek to amend his federal petition to include the additional claims once they were exhausted and thereby avoid piecemeal litigation in federal court. The court asked respondent to address the motion and, after petitioner filed a reply, granted it. See Oct. 29, 1997 Order at 2-5.

Respondent now moves for reconsideration and requests that the court vacate its October 29, 1997 order and dismiss the petition as untimely. Respondent argues that: (1) the instant petition containing one exhausted claim is time barred because it was filed on June 13, 1997, more than 2 months after the period of limitation expired on April 23, 1997; and (2) petitioner's state petition (containing the five additional claims) cannot toll the period of limitation because it was not actually filed in the Supreme Court of California until April 25, 1997, two days after the period of limitation expired. For the reasons set forth below, the motion is denied and the court's October 29, 1997 order is amended.

II.

In Rose v. Lundy, 455 U.S. 509, 510 (1982), the Supreme Court directed district courts to dismiss "mixed petitions" containing both exhausted and unexhausted claims and leave "the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the distruct court." Many district courts implemented Rose v. Lundy by routinely dismissing mixed petitions without prejudice to filing a new petition containing only exhausted claims or containing all claims once they are exhausted in state court. Under this "dismissal without prejudice to filing a new petition" approach, the prisoner is not afforded an opportunity to amend or resubmit his petition with only exhausted claims. This approach affords the district court better management and control over its docket (e.g., the court need not monitor whether the prisoner amends

or resubmits his petition) and, as long as there is no time limitation on the filing of the new petition, causes no detriment to the prisoner. The recent enactment for the first time of a one-year statute of limitation on the filing of a federal habeas petition[1] makes the "dismissal without prejudice to filing a new petition" approach no longer appropriate, however, as this case illustrates.

Petitioner filed a federal petition just before the new one-year period of limitation expired on April 23, 1997 and sought to raise all of his cognizable claims (exhausted and unexhausted).[2] The court dismissed the mixed petition under the "dismissal without prejudice to filing a new petition" approach and did not afford petitioner an opportunity to amend or resubmit his petition with only exhausted claims. See Anthony v. Cambra, No. C 97-1474 FMS (PR), slip op. at 2 (N.D. Cal. May 22, 1997) (order of dismissal). Petitioner nonetheless promptly filed a new petition containing only an exhausted claim on June 13, 1997.

If petitioner had been afforded an opportunity to amend or resubmit his petition with only exhausted claims, his June 13, 1997 filing would relate back to April 23, 1997 and unquestionably be timely. See Fed. R. Civ. P. 15(c). The court's dismissal of the original petition under the "dismissal without prejudice to filing a new petition" approach did not afford petitioner such an opportunity. Equity requires that the June 13, 1997 filing be construed as an amendment or

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1. The Antiterrorism and Effective Death Penalty Act of 1996 became law on April 24, 1996 and imposed a one-year statute of limitation on federal habeas petitions filed by state prisoners. See 28 U.S.C. § 2244 (d).

2. A prisoner with a conviction finalized before April 24, 1996, as is the case here, had at least until April 23, 1997 to file his habeas petition. See Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1287 (9th Cir. 1997) (allowing § 2244 (d)'s limitation period to commence before AEDPA's enactment would have impermissible retroactive effect), cert. denied, 118 S. Ct. 899 (1998).

resubmission to the original petition filed on April 23, 1997 and be considered timely. See Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir. 1988) (court may accept resubmitted petition with only exhausted claims nunc pro tunc to date of original filing).

The new statute of limitation on the filing of federal habeas corpus petitions requires that district courts provide prisoners who file mixed petitions with an opportunity to strike their unexhausted claims and amend or resubmit their petitions so that their amendment or resubmission can relate back to the date of the original filing and not be time-barred.

III.

The instant petition also may be timely, as a matter of law, if the limitation period was tolled by petitioner's state habeas petition pursuant to 28 U.S.C. § 2244 (d) (2). See Reyes v. Keane, 90 F.3d 676, 678 (2d Cir. 1996) (limitation period is tolled under § 2244 (d) (2) for time period during which properly filed application for post-conviction or other collateral review is pending in state court). Put simply: If the state petition was pending in state court between April 23, and June 13, 1997, the limitation period was tolled during that time and the federal petition filed on June 13, 1997 was timely.

Respondent argues that the state petition did not toll the limitation period because it was not actually filed in the Supreme Court of California until April 25, 1997, two days after the period of limitation expired, and therefore there was no time left to toll. Petitioner submits an exhibit showing that he delivered his petition to prison authorities for mailing on April 21, 1997 and contends that this was his actual filing date under Houston v. Lack, 487 U.S. 266 (1988).

In Houston v. Lack, the Supreme Court held that pro se prisoners' notices of appeal are deemed filed when delivered to prison authorities for mailing to the court. 487 U.S. at 276. This "mailbox rule" is premisd on policy concerns surrounding

pro se prisoners' lack of control over delays between prison authorities' receipt of the notice and its formal filing by the court. See id. at 273-76. Respondent contends that the rule is limited to the filing of notices of appeal and does not apply here.

Although some courts in other circuits have resisted extending the application of the Houston "mailbox rule," see, e.g., Allen v. Dowd, 964 F.2d 745, 746 (8th Cir.) (declining to apply Houston rule beyond notice of appeal context), cert. denied, 506 U.S. 920 (1992);[3] Norlander v. Plasky, 964 F. Supp. 39, 42-43 (D. Mass. 1997) (same), the Ninth Circuit consistently has applied the rule to its cases involving pro se prisoner litigation, see, e.g., Schroeder v. McDonald, 55 F.3d 454, 459 (9th Cir. 1995) (applying Houston rule to service of Rule 59 (e) motion); Caldwell v. Amend, 30 F.3d 1199, 1201 (9th Cir. 1994) (applying Houston rule to filing of Rule 50 (b) motion); Faile v. Upjohn Co., 988 F.2d 985, 988-89 (9th Cir. 1993) (applying Houston rule to service of discovery responses). It even has stated in dicta that "the adversity of interests between prisoners and prison officials central to Houston and its progeny . . . commends extension of Houston's filing exception for pro se habeas petitioners." Caldwell, 30 F.3d at 1201.

This court accordingly joins the Third Circuit in concluding that the reasoning of Houston and its progeny applies with equal force where a pro se prisoner places his habeas petition in the hands of prison authorities for mailing. See Burns v. Morton, No. 97-5568, 1998 WL 15128, at **3-4 (3d Cir. Jan. 9, 1998). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") does not alter this conclusion. See id. (Houston

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3. Butt see Parker v. Bowersox, 975 F. Supp. 1251, 1252-54 (W.D. Mo. 1997) (quesstioning and distinguishing Allen, applying Houston rule to filing of habeas petition, and certifying issue for interlocutory appeal to 8th Circuit).

applies to filing of habeas petition for purpose of satisfying new § 2244 (d) period of limitation added by AEDPA).[4/]

Petitioner handed his state habeas petition to prison authorities for mailing on April 21, 1997, two days before the period of limitation expired. The petition is deemed "properly filed" on that date for purposes of satisfying § 2244 (d) (2). See id.[5/]

It accordingly tolled the limitation period from April 21, 1997 to June 13, 1997, when petitioner filed the instant federal petition.[6/] The federal petition is timely as a matter of law.

IV.

Respondent also urges the court to reconsider its October 29, 1997 order staying the instant petition. The appropriateness of such a stay was addressed recently by the Ninth Circuit. In Calderon v. United States Dist. Court (Taylor), No. 97-70567, 1998 WL 24138, at **6-8 (9th Cir. Jan. 26, 1988), the court held that a district court has discretion to (1) allow a prisoner

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4. See also In re Sims, 111 F.3d 45, 47 (6th Cir. 1997) (deeming § 22444 (b) (3) motion to file second § 2255motion filed on date motion is given to prison authorities for mailing); Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997) (noting that timeliness of § 2254 petition measured from date papers handed to prison authorities for mailing); Hughes v. Irvin, 967 F. Supp. 775, 778 (E.D.N.Y. 1997) (applying Houston rule to filing of § 2254 petition).

5. Although the issue here is the filing of a state petition, the ultimate determination is a federal one, i.e., whether the filing of the state petition satisfied § 2244 (d) (2). Moreover, California Law does not compel a different result. See In re Jordan, 4 Cal. 4th 116 (1992) (applying Houston rule to California courts).

6. It is undisputed that petitioner's state petition was pending in state court on June 13, 1997.

to amend his petition for a writ of habeas corpus to delete unexhausted claims and (2) stay or hold the amended

FERN M. SMITH
United States District Judge

Appendix E

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ANTHONY, Petitioner, **vs.** **STEVEN CAMBRA, Warden,** Respondent.	No. C 97-2232 FMS (PR) **ORDER DENYING MOTION TO FILE AMENDED PETITION AND REINSTATING ORDER TO SHOW CAUSE**

Petitioner first filed a federal petition for a writ of habeas corpus on April 23, 1997. Because the petition contained both exhausted and unexhausted claims (only one of six claims was exhausted), it was dismissed without prejudice. See Anthony v. Cambra, No. C 97-1474 FMS (PR) (N.D. Cal. May 22, 1997) (order of dismissal). Petitioner then filed another petition on June 13, 1997 containing only his one exhausted claim. The court construed the petition as an amendment deleting the unexhausted claims and granted petitioner's motion to stay the petition to allow him an opportunity to exhaust his other five claims. Upon exhaustion of those claims, petitioner could move to further amend the petition to add the newly-exhausted claims. Petitioner accordingly exhausted his additional claims and now moves to file an amended petition adding to the stayed petition his newly-exhausted claims. Respondent opposes the motion arguing that the proposed amended petition would constitute an abuse of the writ.

In Calderon v. United States Dist. Court (Taylor), 134 F.3d 981, 986-88 (9th Cir. 1988), the court of appeals held that a

district court has discretion to (1) allow a prisoner to amend his petition for a writ of habeas corpus to delete unexhausted claims, and (2) stay or hold the amended petition in abeyance subject to further amendment reincorporating the deleted claims once they are exhausted in state court. It noted that further amendment to add or reincorporate the unexhausted claims once they are exhausted could be barred as an abuse of the writ, however. See id. at 988-99.

Because the petitioner in Taylor had not yet attempted to reamend his petition to include newly-exhausted claims, the court's statement on the applicability of the doctrine of abuse of the writ technically was "an observation and has not precedential effect." See Calderon v. United States Dist. Court (Thomas), 144 F.3d 618, 620-21 (9th Cir. 1998). This court finds that the Taylor court's "observation" nonetheless is persuasive: In Rose v. Lundy, "the Supreme Court explicitly warned habeas petitioners that, if they opted to amend rather than to take a dismissal, they 'risk[ed] forfeiting consideration of [their] unexhausted claims in federal court' under abuse-of-the-writ principles." Taylor, 134 F.3d at 988 (quoting Rose v. Lundy, 455 U.S. 509, 520 (1982)). Petitioner's proposed amended petition adding newly-exhausted claims may be barred from federal review if his failure to assert the newly-exhausted claims in his prior, stayed petition constituted an abuse of the writ. See id. at 988-89.

Rule 9(b) of the Rules Governing Habeas Corpus Cases Under Section 2254 provides that a petition may be dismissed for abuse of the writ if it alleges new grounds and the failure to allege them in a prior petition was an abuse of the writ. There is no requirement that the prior petition have been determined on the merits. See Farmer v. McDaniel, 98 F.3d 1548, 1560 (9th Cir. 1996).

The abuse-of-the-writ doctrine examines petitioner's conduct. Until 1991, it was confined to instances of deliberate

abandonment of a claim; unfortunately for petitioner, it now also applies to instances of inexcusable neglect. See McCleskey v. Zant, 499 U.S. 467, 489-93 (1991). The question now "is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege" his claims in his prior, stayed petition. See id. at 498. In other words, did petitioner have a legitimate excuse for failing to raise his newly-exhausted claims earlier?

Respondent properly pleads abuse of the writ by noting, with clarity and particularity, petitioner's prior writ history, identifying the claims that appear for the first time, and alleging that petitioner abused the writ. See id. at 494. Respondent specifically alleges that although petitioner's judgement of conviction became final in 1992, he waited until the last minute to attempt to exhaust his claims before his period of limitation expired on April 23, 1997. Not surprisingly, petitioner was unable to exhaust all of his claims before April 23, 1997 and elected to file a petition containing only his one exhausted claim. He obtained a stay of his petition and proceeded to exhaust his other five claims; however, he also assumed the risk of forfeiting consideration of those five claims unless he had a legitimate excuse for failing to exhaust and raise them earlier.

The burden to disprove abuse of the writ is now petitioner's. To excuse his failure to raise the claims earlier, he must show cause for failing to raise them and prejudice therefrom as those concepts have been defined in federal procedural default decisions. See id. If petitioner cannot show cause, his failure to raise the claims earlier may be excused if he can show that a fundamental miscarriage of justice would result from the failure to entertain the claims. See id. at 494-95. To meet this burden, petitioner must make a colorable showing of factual innocence. See id. at 495 (citing Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986)).

Petitioner's position is simple: He could not exhaust his additional five claims in time to include them in his first petition and file it before a new limitation period expired on April 23, 1997. This does not constitute cause, however. The cause standard requires that petitioner show that some objective factor external to the defense impeded his efforts to construct or raise the claims. See id. at 493. Objective factors that constitute cause include interference by officials that makes compliance with the state's rules impracticable, and a showing that the factual or legal basis for a claim was not reasonably available to petitioner. See id. at 493-94. Petitioner makes no such showing. There is no evidence that any one prevented petitioner from exhausting and presenting his claims earlier or that the claims are based on any new evidence or legal theory not reasonably available. Petitioner's own delay in exhausting and presenting his claims and his lack of knowledge of the law do not constitute cause. See, e.g., Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 909 (9th Cir. 1986) (illiteracy of pro se petitioner not sufficient to meet cause standard).

Petitioner does not make a colorable showing of factual innocence to excuse his abuse of the writ either. Or put differently, he does not "show that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." Schlup v. Delo, 513 U.S. 298, 327 (1995).[1/] The newly-exhausted claims are barred by principles of abuse of the writ.

For the foregoing reasons, petitioner's motion to file an amended petition adding to the stayed petition his newly-exhausted five claims is DENIED. See Bonin v. Calderon, 59

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1. See, e.g., Carriger v. Stewart, 132 F.3d 463, 478 (9th Cir. 1997) (en banc) (court would consider merits of claims barred by doctrine of abuse of the writ if "[i]t is more likely than not that no reasonable juror hearing all of the now available evidence would vote to convict]petitioner] beyond a reasonable doubt").

F.3d 815, 845 (9th Cir. 1995) (district court may deny motion to amend where amendment would be futile because it would be barred by abuse-of-the-writ principles). The stay on the prior petition containing one claim is lifted and the court's order to show cause filed on July 8, 1997 as to the one claim is reinstated as follows:

1. Respondent shall file with the court and serve on petitioner, within 30 days of the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be issued. Respondent shall file with the answer and serve on petitioner a copy of all portions of the state trial record that have been transcribed previously and that are relevant to a determination of the issues presented by the petition.

2. If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the court and serving it on respondent within 30 days of his receipt of the answer.

SO ORDERED.

DATED: _____

_____
FERN M. SMITH
United States District Judge

Appendix F

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ANTHONY, Petitioner, vs. STEVEN CAMBRA, Warden, Respondent.	No. C 97-2232 FMS (PR) ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner was convicted by a jury in San Mateo County Superior Court of the first degree murder of Ronald Ewing ("Ewing"), a business associate. The jury also found that petitioner conspired to murder Ewing and that the murder was carried out for financial gain. On June 1, 1990, petitioner was sentenced to life in prison without possibility of parole. He appealed. The California Court of Appeal affirmed the conviction on June 30, 1992 and the Supreme Court of California denied review on September 24, 1992. Nearly five years later, petitioner filed the instant federal petition for a writ of habeas corpus, which the court found stated a cognizable claim for relief under 28 U.S.C. § 2254 for violation of an agreement of immunity from prosecution. The Court accordingly ordered respondent to show cause why a writ of habeas corpus should not be granted. Respondent has filed an answer to the order to show cause and petitioner has filed a traverse.

Appendix F

FACTUAL BACKGROUND

The prosecution's theory of the case was that petitioner conspired with his business partner, Ronald McIntosh ("McIntosh"), and a hit man, Drax Quartermain ("Quartermain"), to have Ewing murdered. Several motives were offered for the murder, including that petitioner and McIntosh' company, a gold and silver futures telemarketing business called First International Trading Company ("FITC"), owed Ewing money and that Ewing had threatened to expose illegal business pratices of FITC to the Wall Street Journal and the Securities and Exchange Commission if he did not receive payment. The prosecution also showed that petitioner and McIntosh grew bitter about sharing a portion of FITC's profits with Ewing and that there was increasingly animosity towards him.

The prosecution's evidence was geared toward proving that petitioner actively participated in a conspiracy to hire Quartermain for $55,000 to kill Ewing and that petitioner delivered Ewing to Quartermain on a dark and isolated beach near Pacifica during the early morning hours of May 8, 1984, so the murder for hire could be carried out. While petitioner stood by, Quartermain shot and killed Ewing. Ewing's nude body was found washed ashore the next morning.

Several days later, petitioner went to the police and gave a statement implicating Quartermain but denying any participation in the murder itself. After an investigation that lasted several years, charges were brought against petitioner, Quartermain (the hit man) and McIntosh (petitioner's business partner).

The defense theory of petitioner's case was essentially in conformance with the statement petitioner gave the police after the murder. Petitioner told the police that after work on May 7, 1984, he and Ewing went to a few bars where they drank and

talked to women. Late in the evening, they called Quartermain, who petitioner described as a drug supplier, and made arrangements to meet him at Denny's in Pacifica so they could purchase cocaine. In the meantime, they went to a friend's house in Corte Madera and purchased and used cocaine, but not enough. They arrived at Denny's later and made arrangements to follow Quartermain so they could complete the deal and "party." Quartermain got into a station wagon with a woman driving, and Ewing and petitioner followed in petitioner's 1981 Corvette. After both cars pulled off the road, petitioner decided he was "getting real tired. Real pissed off. It's getting late, I've got to go to work." After seeking Quartermain's assurance that he would give Ewing a ride home, petitioner left. He later learned that Ewing had been shot and his body found washed up on the beach. The defense argued to the jury that petitioner had been "the pigeon, the fall guy, the dupe, the guy who's set up" by McIntosh to take the rap for Ewing's murder.

DISCUSSION

A. Standard of Review

This court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The petition may not be granted with respect to any claim that was adjudicated on the merits in state court, however, unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Id. § 2254(d).

B. Claim for Relief

Petitioner contends that the prosecution violated an immunity agreement it made with him in exchange for information about the killing of Ewing and thereby violated his right to due process and privilege against self-incrimination. He specifically contends that the prosecution violated the agreement by using the information he gave them to uncover other incriminating evidence against him.

1. Agreement

On May 10, 1984, petitioner and his attorney met with two San Mateo Court sheriff's deputies, other law enforcement representative and a San Mateo County deputy district attorney. They entered into a four-page written immunity agreement, by which petitioner agreed to give the police information regarding Ewing's murder in exchange for immunity. The written agreement recited that petitioner was on federal and state probation and was not a suspect in the Ewing murder. It notably provided as follows:

> Based on the desire of MICHAEL ANTHONY to cooperate with the investigating homicide detectives and their need to obtain the information from him to locate and to bring to justice the perpetrator of the crime, it is agreed that there will be no state or federal prosecution of MICHAEL ANTHONY with regard to the killing of Ron Ewing provided MICHAEL ANTHONY is telling the truth when he represents that he is not the person who actually did the shooting of Ron Ewing and that he did not enter into an agreement prior to the killing with the perpetuator [sic] of the killing that the person was to kill Ron Ewing. Although it is not based upon the actual killing of Ron Ewing, it is agreed that provided he has been and continues to be truthful with regard to his knowledge of that killing, he will be given immunity

> from any state and/or federal prosecution based upon that homicide.

The parties also memorialized the agreement on tape before petitioner provided any information. The deputy district attorney summarized the agreement: "The understanding generally being by the parties that if [petitioner] cooperates and provides truthful information and was not a principal in the homicide, he then will not suffer any prosecution." Petitioner at this point interjected, "Uh, at that meeting also that you said that I want it on tape. That you, that you have said and I feel that when we bring this guy to trial that possibly he's gonna try to point his finger at me and, as a last result. Is that how you say that?"

The assistant district attorney responded by summarizing a critical aspect of the agreement:

> Okay. It's anticipated that, that based upon the recitals and what limited conversations we've had with the witness and his attorney, Mr. Iverson, that the potential suspect, referred to as the perpetrator in the agreement, may well indicate that the witness, in fact, was the person who actively participated in the crime. It's also my understanding from our limited conversations that present at the scene of the departure was a third person. Possibly a female subject. It's the understanding of the District Attorney that the accusations, if any, to be made by those two people, toward yourself, would not constitute a basis for violating this agreement.

The assistant district attorney then stressed: "And that you understand that at some future date and time we develop independent evidence that you, in fact, were an active participant in the crime, a principal, why then all the information which you're providing us today can be used to prosecute you? Do you know?" Petitioner replied, "I

understand that." Mr. Iverson, petitioner's attorney, then added. "But that's correct and with, and we've also discussed the fact that the evidence is more than simply this gentleman and his girlfriend or whoever she was, coming forward and trying to involve [petitioner] . . . We require some sort of corroborating evidence." Petitioner replied, "Okay, I understand that. I understand that, sir."

2. State court proceedings and rulings

Petitioner moved to dismiss the case against him at the preliminary hearing on the ground that the district attorney promised to use only "independent evidence" to show petitioner's involvement in the killing. Petitioner argued that because all of the prosecution's witnesses were in one way or another the fruit of his 1984 statement, the prosecution was not using "independent evidence" to show that he hired the killer. The magistrate rejected petitioner's interpretation of the immunity agreement and ruled that the phrase "independent evidence" meant only evidence independent of any accusation made by Quartermain and the woman with him at the time of the killing (Debra Chandler), not evidence independent of petitioner's statement. The court also found that independent testimony of other prosecution witnesses, namely that of David Younge, owner of a venture capital company which employed Quartermain as a consultant, supported the inference that petitioner indeed was involved in an agreement to have Ewing murdered. The court therefore concluded that petitioner had not been truthful in his statement to the police and thereby violated the immunity agreement.

Petitioner renewed his motion to dismiss in superior court, but the court agreed with the magistrate that petitioner had breached the immunity agreement. On appeal, petitioner once again argued that the phrase "independent evidence" in the agreement precluded the prosecution from using any evidence

obtained through his statement to prove his guilt at trial. The Court of Appeal rejected his argument:

> [Petitioner's] interpretation of the phrase "independent evidence" is strained. When the phrase is read in context, it is clear the immunity agreement contemplated the prosecution could pursue any information provided by [petitioner]. The agreement contemplated only that [petitioner's] immunity would not be abrogated simply on the uncorroborated accusations of the two persons present at the scene of the murder. If the prosecution developed evidence of [petitioner's] involvement in the murder "independent" of the uncorroborated accusations of these two persons, then [petitioner] could be prosecuted based on all the evidence the prosecution could muster- -including the information provided in his statement. In other words, the "independent evidence" referred to in the agreement is evidence independent from the accusations of the perpetrator and his companion, not evidence independent from witnesses and leads developed from [petitioner's] statement.

People v. Anthony, No. A050121, slip op. at 13-14 (Cal. Ct. App. June 30, 1992) (Resp't Ex. J).

3. Analysis

Immunity issues usually arise when a defendant refuses to testify before a court on Fifth Amendment grounds. The government may compel the testimony over the defendant's claim of the privilege against self-incrimination, if it grants immunity to the defendant under an appropriate immunity statute. See Kastigar v. United States, 406 U.S. 441, 448 (1972)

(upholding constitutionality of immunity statutes).[2] In federal criminal cases, the government may compel testimony by granting use and derivative use immunity to the defendant under 18 U.S.C. § 6002. "Use immunity" means that the compelled statements cannot be used against the defendant. See United States v. Plummer, 941 F.2d 799, 803 (9th Cir. 1991). "Derivative use immunity" means that the government must derive all the information used as the basis for any prosecution of the defendant from sources wholly independent of the defendant's statements. See id. The government may not use the statements to uncover other incriminating evidence, focus the investigation, decide to initiate prosecution, interpret other evidence, or otherwise plan trial strategy. See United States v. Montoya, 45 F.3d 1286, 1295 (9thCri.), cert denied, 516 U.S. 814 (1995).

When, as in this case, the defendant has not been forced to testify and so has not claimed the Fifth Amendment privilege against self-incrimination, the government can grant him varying degrees of immunity in an informal agreement. See United States v. Dudden, 65 F.3d 1461, 1467 (9th Cir. 1995); see also United States v. Camp, 72 F.3d 759, 762 (9th Cir. 1995) (informal immunity agreement has no more effect than cooperation agreement), cert. denied, 517 U.S. 1162 (1996). If the government informally promises that the statements will not be used against the defendant, it is precluded from using the statements to uncover other incriminating evidence, unless the agreement expressly provides otherwise. See Dudden, 65 F.3d. at 1467. The issue therefore is one of interpreting the informal immunity agreement. See United States v.Mendoza, 78 F.3d

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2. Congress and every State in the Union, as well as the District of Columbia and
Puerto Rico, have passed one or more immunity statutes. See Kastigar, 406 U.S. at 447
& n. 18.

460, 464 (9th Cit. 1996). Such agreements are interpreted using ordinary contract principles. See id.; Dudden, 65 F.3d at 802.

The California Court of Appeal carefully reviewed the written agreement and accompanying tape memorializing the agreement and rejected petitioner's interpretation that his statement could not be used to uncover other incriminating evidence. The court concluded that the only condition on the use of petitioner's statement was that it could not be used against him if the only evidence linking petitioner to Ewing's death was the uncorroborated accusations of Quartermain and Chandler. See People v. Anthony, No. A050121, slip op. at 14 (Cal. Ct. App. June 30, 1992). The court reasoned that the whole point of the immunity agreement was that immunity would be revoked if there was a factual determination that petitioner was lying and had, in fact, hired the triggerman. "Such a factual determination was made based upon evidence obtained independent from any accusations made by Quatermain and/or Chandler. At that point, the conditions placed on [petitioner's] immunity were breached, and all the evidence- -including evidence developed from [petitioner's] statement to the police- -could be used to prosecute him." Id. at 15.

The California Court of Appeal's decision was a reasonable application of law to the facts of the case. Under 28 U.S.C. § 2252(d), petitioner is entitled to habeas relief on his claim that the government violated the immunity agreement in violation of his right to due process only if the state court's decision rested on an unreasonable application of law to the facts of the case. See Drinkard v. Johnson, 97 F.3d 751, 768 (5th Cir. 1996) (citing 28 U.S.C. § 2254(d)), cert. denied, 117 S. Ct. 1114 (1997). An application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. See id. at 769. This cannot be said here. The California Court of Appeal's carefully-reasoned decision is not

so clearly incorrect that it would not be debatable among reasonable jurists. See id. Petitioner is not entitled to habeas relief on his due process claim.

Nor is petitioner entitled to relief on his claim that the immunity agreement violated his privilege against self-incrimination. Petitioner was not required to testify. He testified pursuant to an agreement entered into freely on his own initiative and for his own purposes. Petitioner was free to agree to conditions that could not have been imposed upon him and had he chosen to claim his Fifth Amendment privilege. See United States v. Irvine, 756 F.2d 708, 712 (9th Cir. 1985). As long as petitioner had the option to remain silent, his statement cannot be considered involuntary. See Camp, 72 F.3d at 761.[3]

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED.

SO ORDERED.

DATED: _____

_____
FERN M. SMITH
United States District Judge

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3. Certain cruel choices, and choices made in highly coercive circumstances, are proscribed by the Fifth Amendment even though the state, strictly speaking, does not compel an incriminating statement. But nothing in the record here suggests that any negative consequences would have followed if petitioner had invoked the privilege and remained silent. See Camp, 72 F.3d at 761-62.

Appendix F

FILE COPY

United States District Court
for the
Northern District of California
January 20, 1999

* * CERTIFICATE OF SERVICE * *

Case Number : 3:97-cv-02232

Anthony
vs
Cambra

I, the undersigned, hereby certify that I am a employee in the Office of the Clerk , U.S. District Court, Northern District of California.

That on January 20, 1999, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Sharon G. Birenbaum, Esq.
CA State Attorney General's Office
50 Fremont Street
Room 300
San Francisco, CA 94105

Appendix F

Michael Anthony
PBSP-II
Pelican Bay State Prison
E - 57151 A8 -107
P O Box 7500
Crescent City, CA 95531

Richard W. Wieking, Clerk

BY: _____
Deputy Clerk

APPENDIX G

Appendix G

S060848

IN THE SUPREME COURT OF CALIFORNIA

IN RE MICHAEL ANTHONY

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED. (*In re Swain* (1949) 34 Cal.2d 300, 304; *In re Clark* (1993) 5 Cal.4th 750; *In re Dixon* (1953) 41 Cal.2d 756, 759; *In re Lindley* (1947) 29 Cal.2d 709, 723.)

Chief Justice

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Supreme Court, U.S.
FILED
MAY 3 2001
OFFICE OF THE CLERK

No. 00-1509

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

STEVEN CAMBRA, Warden, *Petitioner*,

v.

MICHAEL ANTHONY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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**Counsel of record for Respondent*

2 cp

No. 00-1509

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

STEVEN CAMBRA, Warden, *Petitioner*,

v.

MICHAEL ANTHONY, *Respondent*.

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**Counsel of record for Respondent*

Questions Presented

1. Does the Court of Appeals' application of Rule 15(c) of the Federal Rules of Civil Procedure raise critical legal issues that merit certiorari where the district court failed to rule on the petitioner's motion for stay of proceedings because the motion was received by the clerk but not file-stamped, such that the Court of Appeals permitted relation-back of claims that had already been presented in an earlier, timely-filed petition?

2. Does the Court of Appeals' application of the "mailbox rule" on the unusual facts of this case raise critical legal issues that merit certiorari, given that the petition was timely filed in the California Supreme Court, given that California has adopted the "mailbox rule" for filing notices of appeal, and given that California has established a 90-day filing deadline within which a capital habeas petition is presumptively timely, such that California would likely apply the "mailbox-rule" to the filing of state habeas petitions?

No. 00-1509

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

STEVEN CAMBRA, Warden, *Petitioner*,

v.

MICHAEL ANTHONY, *Respondent*.

MOTION TO PROCEED IN FORMA PAUPERIS

Pursuant to Title 18, United States Code § 3006A(d)(7) and Rule 39 of this Court, Respondent Michael Anthony asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees and costs and to proceed *in forma pauperis*.

Respondent proceeded *pro se* at trial and was represented by counsel pursuant to Title 18, United States Code, § 3006A(b), (d)(7) in the district court and on appeal to the Ninth Circuit Court of Appeals.

Dated: May 3, 2001

BARRY J. PORTMAN
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**Counsel of Record for Respondent*

No. 00-1509

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

STEVEN CAMBRA, Warden, *Petitioner*,

v.

MICHAEL ANTHONY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

A habeas petitioner seeking to incorporate new claims into his already-filed petition has traditionally relied upon the amendment procedure set forth in Rule 15(c) of the Federal Rules of Civil Procedure. Congress, in enacting the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") gave no indication that it intended to change this settled practice. Indeed, subsequent to the enactment of the AEDPA, district courts have continued to utilize the procedure of Rule 15(c) to determine whether leave to amend should be granted in habeas proceedings. Reviewing this precedent and the absence of authority to the contrary, the Court of Appeals concluded that Rule 15(c) continues to apply to habeas proceedings.

The state contends that this settled practice must now be rejected in light of the enactment of the AEDPA because amendment through Rule 15(c) may interfere with the orderly resolution of habeas claims. This concern is not well-founded because the procedure set forth in Rule 15(c) adequately accounts for concerns of delay and untimeliness. The Court of Appeals' determination raises no critical or novel legal issues and certiorari is therefore unwarranted.

In the alternative, the state contends that even if amendment is permissible under Rule 15(c), the Court of Appeals erred in permitting amendment in this case. Once again, the state's argument should be rejected. The Court of Appeals' determination appropriately rested upon the "unusual" facts of this case, including that Mr. Anthony had

presented all the claims in his initial petition, although some were not yet fully exhausted, and had subsequently requested a stay of proceedings so that he could exhaust those claims, but his motion for stay was inadvertently never ruled upon by the court. The Court of Appeals thus correctly concluded that Rule 15(c) was "ideally suited to circumstances such as these." In response, the state contends for the first time in this Court that it did not have notice of the newly exhausted claims because it was never served with Mr. Anthony's initial petition. This factual contention is not supported by the record and cannot provide any basis for a grant of certiorari.

The state also challenges the Court of Appeals' application of the "mailbox rule," under which the Court of Appeals concluded that Mr. Anthony's state habeas petition was timely filed within the statute-of-limitations period for purposes of the tolling provision of 28 U.S.C. § 2244(d)(2). Citing the Tenth Circuit's analysis of New Mexico's procedural rules and the Fifth Circuit's rejection of the mailbox rule for filings in Texas state courts, the state contends that a circuit conflict exists because the Tenth and Fifth Circuits have declined to apply the mailbox rule to state filings. In fact, no circuit conflict exists because both the Tenth and Fifth Circuits recognized that federal courts may apply the mailbox rule to state filings if the state's procedural rules indicated that the state itself would follow the mailbox rule.

In support of its argument, the state implies that California would be unlikely to apply the mailbox rule to the filing of state habeas petitions because California has no

statutory deadline for habeas petitions. In fact, California *does* have a statutory deadline for the filing of *capital* habeas petitions, under which such petitions are presumptively timely if filed within 90 days of the filing deadline for the appellant's reply brief in the California Supreme Court on direct appeal. Moreover, the California Supreme Court has followed *Houston v. Lack*, 487 U.S. 266 (1988) to permit the filing of notices of appeal pursuant to the mailbox rule, and the California Legislature has expressly codified the California Supreme Court's holding. Because California would likely apply the mailbox rule to the filing of state habeas petitions, the Court of Appeals correctly applied the mailbox rule in this case and there is no circuit conflict warranting the grant of certiorari.

For the foregoing reasons, the state's petition for writ of certiorari raises no worthy issues for review and the petition should accordingly be denied.

STATEMENT OF THE CASE

Respondent Michael Anthony was convicted of first-degree murder and conspiracy to commit murder on May 3, 1990. On July 1, 1990, the trial court sentenced Mr. Anthony to life in prison without the possibility of parole, with a consecutive one-year enhancement for a prior prison term. The California Court of Appeals affirmed the judgment on June 30, 1992 and the California Supreme Court denied Mr. Anthony's petition for review on September 24, 1992.

The AEDPA became law on April 24, 1996. The AEDPA established a one-year statute of limitations for collateral challenges to convictions in state court, requiring all

habeas claims to be brought in federal court within one year of the conclusion of direct review in state court. In the majority of circuits, including the Ninth, a prisoner whose conviction became final prior to April 24, 1996 had until April 24, 1997 to file his petition in federal court. However, the one-year statute of limitations was tolled during any period in which a prisoner's petition for collateral review was pending in state court. 28 U.S.C. § 2244(d)(2).

On April 21, 1997, Mr. Anthony presented to prison authorities at Pelican Bay State Prison a petition for writ of habeas corpus that he sought to file in the California Supreme Court.

Four days later, on April 25, 1997, the petition was filed in the California Supreme Court.

In the interim, on April 23, 1997 the federal district court in the Northern District of California filed a separate federal habeas petition that Mr. Anthony submitted. This habeas petition was "mixed" in that it contained one exhausted claim and five unexhausted claims. The unexhausted claims were contained within the state petition that Mr. Anthony had simultaneously filed with the California Supreme Court.

While the state petition was pending in the California Supreme Court, the federal petition was dismissed by the district court without prejudice because it was a "mixed" petition containing unexhausted claims.

On June 13, 1997, Mr. Anthony refiled the one exhausted claim with the district

court. The district court construed this petition as an amendment to the petition that he had previously filed and ordered the June 13 petition filed *nunc pro tunc* as of the date of the original filing on April 23, 1997.

Also on June 13, 1997, Mr. Anthony separately submitted a motion requesting that the federal petition be stayed pending exhaustion of his remaining claims in state court, but this motion for stay was somehow overlooked and was not filed or ruled upon by the district court.

On July 8, 1997, the district court issued an order to show cause directing the state to respond to the one exhausted claim raised in Mr. Anthony's June 13 petition.

On July 30, 1997, the California Supreme Court denied Mr. Anthony's habeas petition, stating in full: "Petition for writ of habeas corpus is DENIED. (*In re Swain* (1949) 34 Cal.2d 300, 304; *In re Clark* (1993) 5 Cal.4th 750; *In re Dixon* (1953) 41 Cal.2d 756, 759; *In re Lindley* (1947) 29 Cal.2d 709, 723.)" Neither Mr. Anthony nor the state received notice that the habeas petition had been denied.

On September 23, 1997, without realizing that his state petition had been denied, Mr. Anthony renewed his request for a stay of his federal petition pending exhaustion of the petition in state court.

On October 29, 1997, the district court ruled on Mr. Anthony's motion for stay. The court observed that, although neither party appeared to have received notice, the California Supreme Court had ruled on the state petition such that the claims had become

exhausted and could be presented in federal court. Noting that Mr. Anthony had "proceeded expeditiously and in good faith," the court granted his motion to stay federal proceedings and ordered Mr. Anthony to file his amended petition within 30 days of the date of its order.

The state moved for reconsideration on grounds that Mr. Anthony's June 13 petition was not timely filed. On February 18, 1998, the court reaffirmed its prior ruling and again directed Mr. Anthony to file his amended petition within 30 days. The court found that Mr. Anthony's June 13 petition was timely filed on two alternate grounds. First, the court noted that it had erred in dismissing Mr. Anthony's April 23 petition without permitting him to amend or resubmit that petition to include only unexhausted claims. Had Mr. Anthony been permitted to amend the April 23 petition, the June 13 petition would thus have been "unquestionably . . . timely" under Federal Rule of Civil Procedure 15(c). The court thus concluded that "[e]quity requires that the June 13, 1997 filing be construed as an amendment or resubmission to the original petition filed on April 23, 1997 and be considered timely."

As an alternate ground for finding that the petition had been timely filed, the district court noted that the AEDPA's statute of limitations would have been tolled for any period during which Mr. Anthony's state petition were pending. That petition had been filed in the California Supreme Court on April 25, 1997 and was still pending on June 13. Because Mr. Anthony had actually presented the petition to prison authorities on

April 21, 1997, which was within the limitations period, the district court applied the "mailbox rule" set forth in *Houston v. Lack*, 487 U.S. 266 (1988), and concluded that the state petition had been filed on April 21, 1997 for purposes of tolling the AEDPA's statute of limitations. The court indicated that California law supported application of the mailbox rule in light of the California Supreme Court's decision in *In re Jordan*, 4 Cal.4th 116 (1992) (applying the mailbox rule to the filing of notices of appeal).

In compliance with the district court's order, Mr. Anthony delivered his amended petition to prison authorities on March 17, 1998, and it was filed with the district court on March 23, 1998. The district court thereafter denied Mr. Anthony's motion to amend his petition with the newly exhausted claims, ruling that he had "abused the writ."

In a published decision, the Court of Appeals found that the district court had properly applied Rule 15(c) to hold that the June 13 petition was an amendment to the April 23 petition. The Court of Appeals observed that the district court had erred in dismissing the April 23 petition outright, because the district court should have granted Mr. Anthony leave to amend. In addition, citing its earlier holding in *Saffold v. Newland*, 224 F.3d 1087 (9th Cir. 2000), the court affirmed the district court's conclusion that the "mailbox rule" would provide alternate basis to determine that the petition was timely. Finally, the court reversed the district court's determination that the newly exhausted claims were untimely. The court noted that the state had received notice of the claims in Mr. Anthony's April 23 petition. In addition, the court observed that Mr. Anthony had

acted with diligence in exhausting the claims and seeking to amend his petition. Thus, the court concluded that Rule 15(c) permitted Mr. Anthony to amend his petition to include the newly exhausted claims.

The state petitioned for rehearing and requested rehearing en banc. The Court of Appeals denied the petition for rehearing and request for rehearing en banc on January 26, 2001.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' Resolution of the Rule 15(c) Issue Does Not Merit Review by This Court

A. The Court of Appeals Followed Settled Practice in Concluding that Rule 15(c) Governs Proposed Amendments in Habeas Proceedings

Numerous circuits have noted the applicability of Federal Rule of Civil Procedure 15(c) in federal habeas corpus proceedings. *See, e.g., United States v. Thomas*, 221 F.3d 430, 436 (3d Cir. 2000); *United States v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000); *Mederos v. United States*, 218 F.3d 1252, 1254 (11th Cir. 2000); *United States v. Espinoza-Saenz*, 235 F.3d 501, 504-05 (10th Cir. 2000); *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999). As the Eighth Circuit has observed, "[b]ecause habeas proceedings are civil in nature, the Federal Rules of Civil Procedure apply. Rule 15 allows amendments to pleadings, and leave to amend is within the discretion of the trial court." *Craycraft*, 167 F.3d at 457 n.6 (internal citations omitted). *See also Calderon v. Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring) (under Rule 11 of the Rules

Governing Section 2254 Cases in the United States District Courts, and unless otherwise expressly governed by statute, amendments in habeas corpus cases are governed by Rule 15).

While the state argues that Rule 15 should no longer be applied in habeas proceedings in light of the enactment of the AEDPA, every case cited above was issued after the AEDPA became law. Indeed, the Third Circuit rejected a similar contention where the petitioner sought to amend a section 2255 petition after the statute of limitations had passed. *See Thomas*, 221 F.3d at 434 ("The government posits that the tension between Rule 15(c) and the AEDPA requires us to hold that Rule 15(c) cannot apply to habeas proceedings in the same manner in which it applies to other civil proceedings. We disagree.").

Here, the Court of Appeals found no authority to support the state's position. App. A at 20. To the contrary, several courts have applied Rule 15(c) after passage of the AEDPA to permit filing of otherwise untimely amendments. *See, e.g, Mederos v. United States*, 218 F.3d 436 (11th Cir. 2000); *Grossi v. United States*, 1999 WL 439237, at *10-11 (N.D.Ill. June 28, 1999). Moreover, the Court of Appeals rejected the state's argument that application of Rule 15(c) would interfere with the orderly resolution of habeas petitions. Importantly, the Court of Appeals observed that the petitioner must seek leave to amend from the district court, which will perform a gate-keeping function in determining whether amendment should be permitted. App. A at 22-23. The district

court may refuse to permit amendment if "there is any evidence of 'undue delay, bad faith, or dilatory motive' with respect to the filing of the amendment." App. A at 23 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962). Because the district court is well-suited to perform the gate-keeping function authorized by Rule 15(c), and because the AEDPA set forth no alternate procedure to govern the amendment of habeas petitions, the Court of Appeals' resolution of this issue rested upon a plain application of settled law. As the Court of Appeals noted, "[t]he state has cited to no authority that supports the proposition that AEDPA renders Rule 15 inapplicable to federal habeas corpus proceedings." App. A at 20.

In support of its position, the state contends that the Court of Appeals' decision will allow habeas petitioners to conduct an "end-run" around the AEDPA's one-year limitations period. Under the state's reading of the Court of Appeals' decision, habeas petitioners will now be permitted to file an improper "mixed" petition within the statute of limitations; will then be permitted to stay their exhausted claims; and will finally be permitted to amend their petition with any additional claims once they have been exhausted.

The Court of Appeals considered and rejected the state's argument on two grounds, each of which rested upon the peculiar facts of this case. First, as the Court of Appeals reasoned, the touchstone of the Rule 15(c) analysis is notice, which Mr. Anthony provided in his initial petition. App. A at 22. The court thus distinguished *Craycraft* and

United States v. Duffus, 174 F.3d 333 (3d Cir. 1999), in which the petitioners had attempted to amend their petitions with entirely new claims after the statute of limitations period had expired. Here, by contrast, Mr. Anthony sought to amend his petition with precisely the same claims that he had already presented in the April 23 petition. The court thus concluded, "allowing habeas petitioners to invoke 15(c) in these circumstances will not undermine AEDPA's policy of expediting habeas review." App. A at 22.

In its petition for writ of certiorari, the state disputes the Court of Appeals' conclusion that the state had notice of the claims. For the first time in this Court, the state now contends that it did not receive Mr. Anthony's April 23 petition. Pet. Brief at 12 n.3. This factual contention should be rejected outright because the state never made this claim in the district court or the Court of Appeals. Indeed, without objection from the state, the Court of Appeals explicitly relied upon Mr. Anthony's April 23 filing to conclude: "[t]he state clearly had prior notice of the claims and of Anthony's intention to raise them at the earliest possible time." App. A p.21.

The Court of Appeals also noted the important gate-keeping function that has historically been performed by the district court at every stage of the stay-and-amendment process. First, the district court exercises its discretion to determine whether the petitioner's request for a stay of the exhausted claims should be granted. Second, and more importantly, the district court determines whether to grant the petitioner's subsequent request to amend. Should the petitioner wait years or even months to amend

the petition, the district court has discretion to deny leave to amend. App. A at 22. Here, the record demonstrated that Mr. Anthony was diligent throughout the proceedings and complied with the briefing schedule set by the court, with the only periods of delay flowing from court errors that could not fairly be attributed to him. App. A at 22.

In view of the "unusual" facts of this case, as described by the Court of Appeals, the court correctly concluded that "Rule 15(c) is ideally suited to circumstances such as these." App. A at 23. This Court should therefore deny the state's petition for writ of certiorari because the Court of Appeals' application of Rule 15(c) rested upon settled law.

B. The Court of Appeals Correctly Applied Rule 15(c) to Permit Mr. Anthony to Amend His April 23, 1997 Petition With the Newly Exhausted Claims

As an alternate basis for granting the writ, the state argues that even if Rule 15(c) is applicable in habeas proceedings, the Court of Appeals erred by invoking it in this case. First, the state contends that the June 13 petition could not have been deemed timely filed through relation back to the April 23 petition because the April 23 petition had been dismissed. Second, extending this argument, the state contends that the subsequent filing of the newly exhausted claims in March 1998 must also be considered untimely because the newly exhausted claims could not relate back to the June 13 petition insofar as that petition contained only one claim.

The state argues that the Court of Appeals' decision regarding the application of Rule 15 raises important questions of law. In fact, as noted above, the Court of Appeals'

decision was driven by a highly fact-specific inquiry regarding the unusual manner in which Mr. Anthony's claims were resolved by the district court, such that the precedential value of the court's decision is somewhat limited.

First, while the district court initially dismissed the April 23 petition as a mixed petition, the court subsequently modified its dismissal order when it received Mr. Anthony's June 13 petition containing the one exhausted claim. At that time, the court treated the June 13 petition as an amendment of the April 23 petition, which it deemed submitted *nunc pro tunc* to the original filing date of April 23. The court clarified that it had erred in dismissing the April 23 petition because the court should have granted Mr. Anthony leave to amend. The court's action in correcting its error was in line with settled law. As the Court of Appeals concluded, "The district court erred in dismissing the petition without leave to amend; it acted within its discretion when it corrected its error by construing Anthony's June 13 filing as an amendment." App. A at 17 n.1. As characterized by the Court of Appeals, the district court "properly exercised its equitable powers to accept Anthony's June 13 petition *nunc pro tunc* to April 23, the date of the original filing." App. A at 16.

Second, the Court of Appeals also noted the "unusual" fact that while Mr. Anthony sought a stay of the federal proceedings on June 13, his motion for stay was never file-stamped or ruled upon. By the time Mr. Anthony reinstated his request for a stay on September 23, the California Supreme Court had already denied his habeas petition such

that the statute of limitations in federal court was no longer tolled. As the Court of Appeals noted, if the motion for stay had been timely granted, then Mr. Anthony could have sought to amend his petition with the newly exhausted claims while the petition was stayed in the district court, as soon as he received word that the California Supreme Court had denied his petition. App. A at 19-20. In light of the district court's failure to rule on the motion for stay, the Court of Appeals noted that the only way that Mr. Anthony's remaining claims could be timely filed would be through relation back to the original petition.

It is also significant that Mr. Anthony had almost completed the exhaustion process at the time that he filed his petition in federal court. As noted, he filed his final state petition at the same time that he filed his initial federal petition, raising in state court the same five unexhausted claims that he had presented to the district court. Those claims were exhausted approximately three months later when the California Supreme Court denied the petition.

Finally, the Court of Appeals correctly determined that Rule 15(c) permitted relation-back and incorporation of the newly exhausted claims in March 1998. On this point, the state argues incorrectly that the June 13 petition contained only one claim, such that the claims submitted in March 1998 could not relate back to that petition. In fact, the state ignores the import of the district court's ruling regarding the June 13 petition, because the district court's relation-back of the June 13 petition to the April 23 petition

effectively reinstated the April 23 petition for purposes of subsequent amendments under Rule 15(c). Notwithstanding the state's belated contention that it did not receive the April 23 petition, the record below demonstrates that the state did receive the petition. Indeed, without objection from the state, the Court of Appeals relied upon this fact to conclude that the state had notice of the claims. As this Court has observed, "The rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitation were intended to provide." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 150 n.3 (1984). That logic applies with equal force here. Thus, in view of the settled law supporting the Court of Appeals' holding both before and after enactment of the AEDPA, and in light of the fact that the April 23 petition contained the precise claims that Mr. Anthony subsequently sought to incorporate, the Court of Appeals correctly concluded that the amendments in March 1998 should have related back to his initial petition.

II. The Court of Appeals' Resolution of the "Mailbox Rule" Issue Does Not Merit Certiorari

As an alternate and independent basis for concluding that Mr. Anthony's June 13 petition was timely, the district court and the Court of Appeals concluded that the one-year limitations period under the AEDPA would be tolled beyond April 23, 1997 as long as Mr. Anthony's state petition was pending in the California Supreme Court at that time. 28 U.S.C. § 2244(d)(2). The record demonstrated that Mr. Anthony had presented his petition to prison authorities at Pelican Bay State Prison on April 21, 1997. However, it

had not actually been filed until April 25, 1997, which was outside the limitations period. Following *Houston v. Lack*, 487 U.S. 266 (1988) and *Saffold v. Newland*, 224 F.3d 1087 (9th Cir. 2000), the Court of Appeals applied the "mailbox rule" and concluded that the petition should be deemed filed as of April 21, 1997.

The state argues that this Court should grant certiorari to resolve a circuit conflict regarding the authority of federal courts to apply the "mailbox rule" to the filing of habeas petitions in state court. Pet. Brief. at 16-17 (citing *Adams v. LeMaster*, 223 F.3d 1177 (10th Cir. 2000); *Coleman v. Johnson*, 184 F.3d 398 (5th Cir. 1999). In addition, the state argues that the Court of Appeals' opinion conflicts with this Court's decision in *Artuz v. Bennett*, 121 S.Ct. 361 (2000). Both contentions are without merit.

First, the state mischaracterizes the import of the holdings in *Adams* and *Coleman*. In fact, those cases are not in conflict with the decision of the Court of Appeals because neither *Adams* nor *Coleman* concluded that federal courts lack the authority to apply the mailbox rule to state filings. Rather, those courts addressed whether the state procedural rules in the pertinent jurisdiction would permit application of the mailbox rule to the filing of state habeas petitions. The Tenth Circuit concluded that New Mexico's rules would not support application of the mailbox rule. *See Adams*, 223 F.3d at 1182 ("We are convinced New Mexico's rules require, at the very least, receipt by the clerk before a petition is filed."). Similarly, the Fifth Circuit noted that the question would turn on the procedural rules of Texas, but the court of appeals declined to conduct that analysis and

instead rejected application of the mailbox rule without explanation. *See Coleman*, 184 F.3d at 402 (internal footnote omitted) ("[Applying the mailbox rule to the filing of a state petition] would require us to interpret state rules of filing and to address the filing systems of state courts. We decline to extend the mailbox rule to the determination of filing dates for state habeas applications.").

In contrast to the state rules considered in *Adams*, which indicated that New Mexico would not apply the mailbox rule to state habeas petitions,[1] California's caselaw and procedural rules demonstrate that California would likely apply the mailbox rule to state habeas petitions. *See, e.g., In re Jordan*, 4 Cal.4th 116, 130-31 (1992) (citing *Houston v. Lack* and reaffirming application of "prison-delivery rule" to filing of notice of appeal); *see also* California Rules of Court, Rule 31(e) (amended Jan. 1, 1994) (codifying *In re Jordan*). Indeed, unlike New Mexico, and contrary to the state's contention that California has established *no* statutory time limit for habeas petitions, *see* Pet. Brief at 17, California has indeed established a statutory time limit for habeas petitions in capital cases: a petition is presumptively timely if it is filed within 90 days of the filing deadline for the appellant's reply brief on direct appeal. *See In re Sanders*, 21 Cal.4th 697, 704-705 (1999) (citing California Supreme Court Policies, Policy 3). After

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[1]New Mexico does not set a time limit for the filing of habeas petitions. *See Adams*, 223 F.3d at 1183. For this reason, the mailbox rule would have limited utility. *See id.* In addition, New Mexico's other procedural rules pertaining to the filing of legal documents refer either expressly or impliedly to actual receipt by the court. *See id.* at 1182.

the 90-day deadline has passed, the petitioner must establish the timeliness of his petition by satisfying a "due diligence" test set forth in *In re Clark*, 5 Cal.4th 750, 797-98 (1993). Thus, because California has expressly adopted the mailbox rule for the filing of a notice of appeal, and because California has established a filing deadline in the context of capital habeas cases, California would likely apply the mailbox rule to the filing of habeas cases.

Second, contrary to the state's remaining contention, this Court's decision in *Artuz* is not in conflict with the decision of the Court of Appeals. In *Artuz*, this Court concluded that a state habeas petition will be considered "properly filed" for purposes of section 2244(d)(2)'s tolling provision even though the petition contains procedurally defaulted claims. *See Artuz*, 121 S.Ct. at 364-65. As noted in *Artuz*, a document is "properly filed" when it is delivered in accordance with the laws and rules governing filing, including rules governing "the form of the document, the time limits on its delivery, the court and office in which it must be lodged, and the requisite filing fee." *See id.* at 364. Because California has adopted the mailbox rule for the filing of a notice of appeal, California would likely extend that holding to conclude that a habeas petition is presumptively timely when submitted to prison authorities within the 90-day deadline.

Finally, it is undisputed that Mr. Anthony's habeas petition was "properly filed" according to California law, and the state has not argued that the timeliness of the petition was a factor in the California Supreme Court's rejection of the claims. Thus, application

of the mailbox rule to toll the federal statute of limitations will not impact or conflict with the California Supreme Court's holding in any way.

For these reasons, the Court of Appeals' resolution of the mailbox rule issue creates neither a circuit conflict nor a conflict with *Artuz*. The state's petition for writ of certiorari should accordingly be denied.

CONCLUSION

The state's certiorari petition raises no worthy issues for review. In accordance with settled law, the Court of Appeals properly applied the relation-back doctrine of Rule 15(c) to permit Mr. Anthony to amend his habeas petition such that his newly exhausted claims would be timely filed. In addition, the Court of Appeals correctly concluded that the newly exhausted claims would also be timely filed through application of the "mailbox rule" to Mr. Anthony's state habeas petition, thus tolling the AEDPA's statute of limitations during the pendency of his state petition. For the foregoing reasons, this Court should deny the state's petition for writ of certiorari.

Dated: May 3, 2001

Respectfully submitted,

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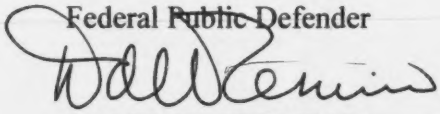
Federal Public Defender



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No. 00-1509

IN THE SUPREME COURT OF THE UNITED STATES

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v.

MICHAEL ANTHONY, *Respondent*.

CERTIFICATE OF SERVICE BY MAIL

I, David W. Fermino, counsel appointed pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(b), hereby certify that on this 3rd day of May, 2001, ten copies of the Brief in Opposition to the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to the Clerk of the Supreme Court of the United States and within the time allowed for filing said Brief in Opposition was served on the following counsel:

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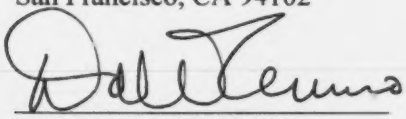

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